Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

NO. _____

* * * 79-1764

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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* * *

Petitioner, Texas Department of Community Affairs, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 17, 1979, with rehearing denied on March 10, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported in 608 F.2d 563. The opinion along with the Order overruling Petitioner's Petition for Rehearing and the Judgment of the District Court are attached as Appendices hereto. Also attached is the decision of the District Court which was appealed by the Respondent to the Court of Appeals.

JURISDICTION

The opinion of the Court of Appeals was entered on December 17, 1979. A timely petition for rehearing with a suggestion that the rehearing be en banc was denied on March 10, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that the Defendant in a Title VII case must prove by a preponderance of the evidence that it relied on a non-discriminatory reason in making a challenged employment decision or whether a Defendant is merely required to articulate a non-discriminatory reason for the decision which the Plaintiff must prove to be pretextual.

2. Whether a finding of non-discriminatory motive by the District Court should be upheld unless found to be clearly erroneous.

STATUTE INVOLVED

The statute involved is 42 U.S.C. §2000e, et. seq.

STATEMENT OF THE CASE

Respondent was hired by Petitioner in January, 1972 as an accounting clerk in the Public Service Careers Division (PSC). She was promoted in July, 1972 to Field Services Coordinator. In early October 1972 Mark Nealy, the Project Director of PSC, assigned Respondent additional duties. Nealy resigned in mid-October 1972, and additional duties were assigned to Respondent in November 1972 by Nealy's former supervisor, John Malone. After Nealy resigned, Respondent performed a coordinating role for the PSC project under Malone (p. 90 TR.). She had some supervisory responsibility (p. 91 TR.).

The United States Department of Labor (DOL) totally funded PSC; in February 1973 DOL gave written notice to B.R. Fuller, the Executive Director of Petitioner, that the PSC program would be terminated at the end of March 1973 because of certain inadequacies. Mr. Fuller subsequently convinced DOL to continue funding PSC subject to certain conditions. DOL ordered the appointment of a permanent Project Director and a reorganization and reduction of staff.

Fuller believed that Respondent was at least partially responsible for the inadequacies in PSC found by DOL and for some dissension among the PSC staff. He decided that the project could best be served if she were terminated along with Marian Kirkland and Roberto Carraveo, the two other professional level employees involved in the dissension.

Fuller appointed Robert Watts to fill the position of Project Director and promoted Robert Walz to the position of Project Coordinator. Walz was the only professional level employee retained in the PSC program.

Respondent, Plaintiff in the District Court below, filed suit in the United States District Court against Petitioner, alleging that she had been discriminated against on the basis of sex in violation of 42 U.S.C. §2000e et seq. After a trial to the Court, the District Court ruled on December 8, 1976, that Petitioner had not acted with discriminatory intent in terminating Burdine while hiring Watts and retaining and promoting Walz.

The Court of Appeals for the Fifth Circuit in its opinion of December 17, 1979, affirmed the District Court's ruling that there had been no discrimination in the decision to hire Watts, rather than Petitioner, for the position of Project Director. However, the Court of Appeals reversed the District Court's finding of no discrimination insofar as it applied to the termination of

Respondent and retention and promotion of Walz. The Court of Appeals ruled that Petitioner had failed to prove by a preponderance of the evidence that it had relied on non-discriminatory reasons in making the decision to retain and promote Walz while terminating Respondent.

Petitioner then filed a petition for rehearing (with the suggestion that the rehearing be en banc) in the Court of Appeals; the petition was overruled on March 10, 1980.

Petitioner now files this Petition for Writ of Cetiorari.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals found that Petitioner discriminated on the basis of sex when it discharged Respondent and retained and promoted Walz. After finding that Respondent had established a prima facie case of intentional discrimination, the Court held that Petitioner had failed to prove by a preponderance of the evidence that the challenged personnel decision had been based on legitimate, non-discriminatory reasons. However, Petitioner at the very least articulated non-discriminatory reasons for the personnel actions taken and Respondent was unable to prove that the reasons articulated were merely pretextual as required under the rule of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Respondent was acting in at least a limited supervisory capacity for the PSC program at the time that the problems with DOL arose. Mr. Fuller testified that part of the PSC program's problems with DOL could be attributed to Respondent in her coordinating and supervising role. (pp. 90, 91 TR.) These problems included (p. 77 TR.):

(1) Lack of proper documentation of expenditures;

(2) Payments made on expired contracts;

(3) Inaccurate expenditure accruals;

(4) Inaccurate enrollee certifications;

(5) Unqualified enrollees being allowed into programs.

Furthermore, in her supervisory role Respondent was, in Mr. Fuller's estimation, ultimately responsible for resolving communication and dissension problems among the staff (pp. 91, 95 TR.). This she failed to do, for, as the District Court found (p. 3, Memorandum Opinion and Order), Respondent and the two other individuals who were terminated from the program with Respondent had disagreements and did not work well together.

Petitioner concluded that a fresh start was needed in the PSC program. Watts, a man with excellent credentials, was made the new Project Director. The contentious employees in the program including Respondent, were removed and Walz, a well qualified young man who was apparently uninvolved in the office dissension was promoted to the position of Project Coordinator. Petitioner reacted to a serious problem with a thorough house cleaning and reorganization of the PSC program.

Petitioner articulated legitimate, non-discriminatory reasons for retaining and promoting Walz while terminating Respondent and thereby satisfied the standard set out in *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978), and *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), for rebutting Respondent's prima facie case. The PSC program had been so poorly managed while Respondent was in a position of at least partial responsibility that it had been threatened with cancellation by DOL. At the same time, as the District Court found, dissension between Respondent and two co-workers in the program lessened their ability to work together. Petitioner concluded that the best solution was

to clear out the troublemakers and proven incompetents and start over.

Only one professional level employee, Walz, was retained in the PSC program. He was promoted to a supervisory position below the new Project Director. Respondent introduced no evidence at trial to rebut Mr. Fuller's testimony that Walz was qualified for this position. Neither was she able to rebut the testimony articulating the reasons for her termination. She introduced no evidence that Walz had been a participant in the dissension wracking the program. There was no evidence attributing to Walz any responsibility for the problems with the program pointed out by DOL. In short, Petitioner articulated several legitimate, non-discriminatory reasons for terminating Respondent and retaining and promoting Walz. At that point, the burden of proof shifted back to Respondent to show that the reasons articulated were pretextual. Respondent failed to satisfy this burden.

The Court of Appeals erred when it held that Petitioner was required to prove by a preponderance of the evidence that it had based its personnel decisions on the reasons that it articulated. Such a rule is in essence the same as requiring Petitioner to prove the absence of discriminatory motive and therefore, conflicts with this Court's holding in *Board of Trustees v. Sweeney, supra.* Realistically, the only way a defendant could prove absence of discriminatory motive would be to prove reliance on legitimate, job related considerations as the Court of Appeals has required in this case. This Court in *Sweeney* held that such proof is not required of a defendant in a Title VII case.

II.

After hearing all of the evidence, the District Court concluded that the personnel actions taken by Petitioner were not based in whole or in part, on considerations of sex. That finding, involving mixed questions of fact and

law, should have been upheld by the Court of Appeals unless found to be clearly erroneous. *Sweeney v. Board of Trustees*, 604 F.2d 106 (1st Cir. 1979), cert. denied, _____ U.S. _____, 100 S.Ct. 733 (1980).

The District Court specifically found that Respondent could not get along with Kirkland and Carraveo and that, consequently, the PSC program was suffering. That fact finding, underlying the ultimate finding of no discrimination, is unquestionably reviewable only under a clearly erroneous standard, *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and, together with other testimony in the record, justified the District Court's ultimate conclusion that Respondent was not discriminated against.

There is conflict among the circuits as to whether an ultimate finding regarding discriminatory intent should be reviewed under a clearly erroneous standard. *Stewart v. General Motors Corporation*, 542 F.2d 445 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). This would be a proper case in which to settle the question.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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First Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon attorney for Respondent by placing same in the United States mail, certified, return receipt requested, addressed to Mr. Hubert L. Gill, P.O. Box 777, Austin, Texas 78767 on this the _____ day of April, 1980.

_____
LONNY F. ZWIENER

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOYCE ANN BURDINE	§	
	§	
v.	§	CIVIL ACTION NO.
	§	A-74-CA-238
	§	
TEXAS DEPARTMENT	§	
OF COMMUNITY	§	
AFFAIRS	§	

MEMORANDUM OPINION AND ORDER

This is a Title VII discrimination in employment case which was tried before the Court in a non-jury trial on November 30th and December 1st, 1976. The Court, having carefully considered the facts stipulated by the parties, the evidence and arguments adduced at trial, the briefs of the parties, and the record in the case, is of the opinion that Plaintiff is not entitled to the relief that she seeks.

Plaintiff was originally employed by the Defendant in January of 1972 as an accounting clerk. Subsequently, she was promoted to the position of Administrative Technician IV. After the acting director of the Public Service Careers Division (PSC) of the Texas Department of Community Affairs (TDCA), in which Plaintiff worked, retired, Plaintiff was given additional duties but was not promoted, and she received no increase in salary to compensate her for the additional duties. In early 1973 changes were made in the PSC program that resulted in a reduction in force, and although Plaintiff sought the position of project director, she was terminated on April 1, 1973, receiving two weeks severance pay. Plaintiff was rehired by Defendant for another job on July 9, 1973. Two males

received positions within the PSC division which Plaintiff believes were denied her because of her sex. It is Plaintiff's contention that because of her sex she was denied compensation equivalent to her job prior to her termination, denied promotion to the position of project director, and terminated from employment with Defendant.

The program in which Plaintiff was employed prior to her termination was experiencing difficulties and went through a significant change immediately prior to and at the time of Plaintiff's termination. The events about which Plaintiff complains cannot be understood without some knowledge of the problems that the PSC division faced. The Public Service Careers Division of the Texas Department of Community Affairs was entirely funded by the United States Department of Labor and was a Manpower program designed to assist certain groups in attaining and improving employment with public employers. The Department of Labor (DOL) was not pleased with the way in which this particular program was being run and as a result notified Mr. B. R. Fuller, the Executive Director of TDCA, that the program would be phased out as of March 31, 1973. Mr. Fuller and others in TDCA believed that the program had substantial merit and that the reasons given by DOL for terminating the program were not based entirely upon a correct understanding of the operation of the program. Thus, efforts were made to influence DOL to continue the program, and after considerable communication between TDCA and DOL, the Department of Labor agreed to continue funding the program. In a letter from Charles Johnson, of DOL, to Mr. Fuller, dated March 20, 1973, the Department of Labor Manpower Administration agreed to extend the contract with the Defendant for the PSC program on certain conditions. (Def. Ex. "C") These conditions included requirements that a project director with complete authority to administer the program, including fiscal matters, be

appointed, that a competent and qualified fiscal officer be appointed, that there be a complete reorganization of the staff, that such reorganization meet with the approval of Mr. Johnson, and that other specified problems and deficiencies be corrected. Among these other problems and deficiencies were overstaffing, a lack of fiscal control, a lack of proper documentation of expenditures, payments made on expired contracts, inaccurate record keeping, a lack of communication among the program staff, a lack of training among the staff, and other questionable practices. In response to these requirements, Robert Watts was transferred from another division of TDCA to the PSC division and made project director. Mr. Allen Walz was promoted to the position of administrative procedure technician, and a clerk-typist and a secretary were retained with the program. At the time of the reorganization and reduction in force Plaintiff was terminated, as were Roberto M. Carraveo, a Manpower training coordinator, and Marian Kirkland, an administrtive procedures technician.

Mr. Fuller testified that the employment decision with regard to the reorganization and its related promotion, transfer and terminations were made on the basis of his evaluations and the recommendations of others concerning the relative qualifications of the individuals involved and what would be best for the PSC program. This Court can find no evidence that indicates that the decision not to give the Plaintiff a position in the reorganized PSC division was based on any sexual discrimination. The Court finds that these decisions were based on a good faith, rational evaluation of the relative qualifications of the parties in question and what would be in the best interest of the PSC program. Furthermore, the decision about who should be terminated, as required by the reduction in force mandated by DOL, was made on a non-sexual basis. The three individuals who were terminated, Plaintiff,

Carraveo and Kirkland, did not work well with each other and had some disagreements, and in light of DOL's concern about a lack of communication within the staff and other considerations, it was certainly a rational decision for Defendant to terminate those parties who had had some problems in the PSC program. It should also be noted that DOL required Defendant to submit its proposed personnel changes to DOL for approval and that DOL did approve the changes that were made, including the actions taken with regard to Plaintiff. Thus, this Court finds that the evidence in this case does not support Plaintiff's contention that the refusal to promote her to the positions given to Watts and Walz or the decision to terminate her in the reduction in force in the PSC program were the result of sexual discrimination.

As to Plaintiff's claim that she was discriminated against because of her sex in not being given additional compensation when she was assigned additional duties were the PSC program in November of 1972, the evidence in this case indicates that other individuals within TDCA, both male and female, have on occasions been temporarily given additional duties without any increase in pay or promotion, and the Court can find no basis upon which to conclude that the additional duties given to the Plaintiff in this case, without any increase in salary or promotion, were the result of sexual discrimination. It is the opinion of this Court, after carefully weighing all of the facts, that the actions of Defendant with regard to the employment of Plaintiff were non-discriminatory and did not violate 42 U.S.C. § 2000e-2(a)(1). It should be noted in this regard that Plaintiff was notified on May 11, 1973 of another position open to her within TDCA and that she ultimately took this position and began work on July 9, 1973. In summary, the Court can find no basis upon which to hold that Plaintiff has been discriminated against because of her sex, and on the contrary, the Court finds that the actions of which Plaintiff complains

were not based, in whole or part, on considerations of her sex. Accordingly, it is

ORDERED, ADJUDGED and DECREED that Judgment be, and hereby is, GRANTED for Defendant, and that the relief requested by the Plaintiff be, and hereby is, DENIED. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered this *8th* day of December, 1976, at Austin, Texas.

/s/

JACK ROBERTS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOYCE ANN BURDINE	§	
	§	
V.	§	CIVIL ACTION FILE
	§	NO. A-74-CA-238
	§	
TEXAS DEPARTMENT	§	
OF COMMUNITY	§	
AFFAIRS	§	

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged and Judgment be GRANTED for Defendant, and that the relief requested by the Plaintiff be DENIED.

Dated at Austin, Texas, this 8th day of December 1976.

DAN W. BENEDICT

Clerk of Court

/s/

Wanda V. Peterson
Deputy Clerk

Joyce Ann BURDINE,
Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS
Defendant-Appellee.

No. 77-1101.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1979.

* * *

This employment discrimination case grew out of events occurring within the Texas Department of Community Affairs in late 1972 and in the spring of 1973. As with all employment discrimination cases, the facts are crucial to the outcome.

Appellant Joyce Burdine, a forty-year-old female, was hired in January 1972 by the Texas Department of Community Affairs (TDCA) as an accounting clerk in the Public Service Careers Division (PSC). She had previously acquired several years of experience in the field of manpower training. The PSC's purpose was to provide training and employment opportunities in the public sector for under-skilled persons. Burdine was promoted in July 1972 to Field Services Coordinator. The Project Director of PSC at that time, Mack Nealy, assigned appellant additional duties in early October 1972 and put her in charge of the division when he was out of the office. Nealy resigned from his position in mid-October, and John Malone, Nealy's former supervisor, assigned appellant additional duties in November 1972. However, Burdine was not promoted or given an increase in pay. Burdine made several oral and written applications for the job of Project Director but received

no reply of any kind. She performed the extra duties assigned to her for approximately six months.

The United States Department of Labor (DOL) totally funded PSC; in February 1973 DOS gave written notice to B. R. Fuller, the Executive Director of TDCA, that the PSC project would be terminated as of the end of March 1973 because of alleged inefficiencies in the program.[1] Appellant assisted Fuller in preparing a reply to the DOL charges; negotiations were begun to seek continuation of the project. DOL approved the continuation of PSC on March 20, 1973, but approval was conditioned on the division's meeting certain requirements. These requirements included, among other matters, the appointment of a permanent Project Director and a reorganization of and reduction in the staff. DOL gave no specific orders as to who should be retained, discharged, or appointed but required only that final staff selections meet with DOL's approval.

Fuller consulted with persons whom he considered to be key advisers in the agency and asked for their recommendations for the position of Project Director. Following these consultations, he selected Robert Watts for the post; at that time Watts worked for another division within TDCA. On the advice of subordinates, Fuller decided to terminate Burdine on April 2 and to retain Allen Walz, who had previously been under appellant's supervision, and to promote Walz to Project Coordinator, a position essentially filled by Burdine before her discharge. The decision to terminate Burdine came after her request, based on her assumption that PSC faced extinction, that she be considered for any suitable position within the agency. Her actions made it clear that she wished to remain with TDCA.

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[1]DOL cited, among other problems, lack of fiscal control, failure to properly document expenditures, payments made on expired contracts, overstaffing, lack of a Project Director, insufficient communication and training within PSC staff, and questionable eligibility of some enrollees.

Soon after her termination and after she filed a charge of discrimination with the EEOC, the appellant was rehired by TDCA in July 1973 as a Planning Assistant with a monthly salary of $968, the exact salary given to Walz upon his promotion on April 1, 1973.[2] Since her reinstatement, Burdine's promotions and increased job responsibilities have enabled her to achieve approximately the salary and duties of the male Project Director. Walz resigned in 1974.

Burdine complains that she has been discriminated against on account of sex in three ways: in TDCA's transferring Robert Watts instead of promoting her to Project Director; in TDCA's discharging her while retaining and promoting Allen Walz; and in TDCA's requiring her to perform essentially the same duties as the Project Director without compensating her equally with the male Project Directors who held the post both before her and after her. The trial court found against plaintiff on all three issues. We shall refer to portions of the court's memorandum opinion in the course of our discussion of each issue.

Plaintiff's Burden in Title VII Cases

Appellee contends that plaintiffs in Title VII[3] cases brought against a government agency must prove discriminatory intent and relies on *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). We rejected that blanket contention in *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979). However, where plaintiff alleges disparate *treatment* under Title VII, as does plaintiff-appellant here, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *International Brotherhood of*

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[2]Walz' salary before his retention and promotion was $590 per month.

[3]42 U.S.C. § 2000e *et seq.*

Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977).[4] Therefore, we accept defendant-appellee's contention, although not for the reasons cited in its brief; proof must have been made at trial that defendant treated Ms. Burdine differently *because* she is female.

Standard of Review

Although discrimination is a question of fact, it is also the ultimate issue for resolution in a Title VII case. Therefore, we as an appellate court must independently determine the merits of plaintiff's allegations, but we are bound by findings of subsidiary facts (evidentiary facts) that are not clearly erroneous. *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975). We must also determine whether the ultimate finding is based on requisite subsidiary facts. *Id.* at 399, *citing Humphrey v. Southwestern Portland Cement Co.*, 488 F.2d 691, 694 (5th Cir. 1974).

Hiring the Project Director

Plaintiff contends that, by transferring Robert Watts, a male, instead of promoting her to Project Director, defendant discriminated against her on account of sex.[5] The elements of such cases are clear. In order to establish a prima facie case, plaintiff must show that (1) she belongs to a group protected by Title VII, (2) she applied for and was qualified for a job for which the

---

[4]The same footnote in *Teamsters*, however, makes clear that proof of motive is not needed when a Title VII plaintiff alleges disparate *impact*.

[5]42 U.S.C. § 2000e—2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after her rejection the position remained open and the employer continued to seek applicants among persons having plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). These elements may differ, depending on the factual context. *Id.* at 802 n.13, 93 S.Ct. 1817. We believe plaintiff's proof at trial clearly met the *Green* criteria. She is protected under Title VII from sex discrimination. She applied for the Project Director's job several times and was considered for the job, and her proof that she was qualified received implicit support from defendant's evidence.[6] The employer rejected her and, after the position remained unfilled for several months, hired a male for the position.

Defendant may refute plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for the rejection. *Id.* This court requires defendant to prove nondiscriminatory reasons by a preponderance of the evidence. *Turner v. Texas Instruments*, 555 F.2d 1251, 1255 (5th Cir. 1977). This holding is not inconsistent with *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), which merely stated that defendant is not required to prove absence of discriminatory motive. Our holding in *Turner* simply states the obvious: "articulating" a legitimate reason involves more than merely stating fictitious reasons; *legally sufficient* proof is needed before the trier of fact can find plaintiff's proof rebutted. *Turner, supra* at 1255.

In *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), this court added another element to defendant's rebuttal in disparate treatment cases: defendant must prove that those he hired or promoted were somehow *better*

[6]For example, on cross-examination, Fuller refused to state that plaintiff was not qualified to be Project Director; he merely asserted that Watts was better qualified.

qualified than was plaintiff; in other words, comparative evidence is needed. An assertion, for example, that plaintiff had a poor work history will not suffice unless defendant can show by comparative factual data that those hired or promoted had a better work history. *Id.* at 339-40.

TDCA introduced testimony that the male who was hired as Project Director, Robert Watts, was better qualified than Burdine. Fuller testified that Watts had a college degree and had done advanced work; Fuller also cited Watts' experience in administration and his ability to work well with others. Burdine, on the other hand, attended college for only one year and had no degree; Fuller also felt that she had had some difficulty with her co-workers. While Fuller admitted that the Project Director need have no degree, we believe that the trial court's implicit evidentiary finding that Watts was better qualified is not clearly erroneous. Thus, the court's holding[7] that TDCA did not discriminate against Burdine in its failure to promote her to Project Director is affirmed.[8]

---

[7]Specifically, the trial court stated:

> This court can find no evidence that indicates that the decision not to give the plaintiff a position in the reorganized PSC Division was based on any sexual discrimination. The court finds that these decisions were based on a good-faith, rational evaluation of the *relative qualifications* of the parties in question and what would be in the best interest of the PSC program.

(emphasis added). It will be noted that the memorandum opinion of the trial court is silent on whether plaintiff made out a prima facie case. However, since we uphold an implicit finding that defendant successfully rebutted plaintiff's case, this lack is immaterial to the outcome here.

[8]Once plaintiff's prima facie case has been successfully rebutted, plaintiff must be given "a fair opportunity to show that [the employer's] stated reason for . . . rejection was in fact pretext." *McDonnell Douglas v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). Since plaintiff does not complain about lack of opportunity to prove pretext, we assume that she had that opportunity and failed to carry that burden of proof.

Retention and Promotion of Walz and Discharge of Burdine

Applying *East's* authority to make an independent determination of plaintiff's allegations, we must disagree with the trial court's finding in regard to Burdine's discharge. The trial court, in addition to its holding quoted in note 7, *supra*, held:

> [T]he decision about who should be terminated, as required by the reduction in force mandated by DOL, was made on a non-sexual basis. The three individuals who were terminated, Plaintiff [and two others], did not work well with each other and had some disagreements, and in light of DOL's concern about a lack of communication within the staff and other considerations, it was certainly a rational decision for defendant to terminate those parties who had had some problems in the PSC program.

Here again plaintiff met *Green's* first three elements. She proved that she sought continuing employment with TDCA and was qualified to do the job that Allen Walz was retained and promoted to do. In fact, she had been doing that job, and more, for six months when terminated. In discharge cases involving disparate treatment incident to a reduction in force, we can articulate *Green's* fourth element thus: after her discharge, the employer hired nonminority personnel having qualifications no better than plaintiff's, or retained those having lesser ones, for positions comparable to hers. *Cf. Marks v. Prattco, Inc.*, No. 79-1394, Slip op. at 1554, — F.2d — (5th Cir., Dec. 7, 1979)(discharge case not involving reduction in force). She meets that element as well. Plaintiff's evidence was uncontroverted by any of defendant's evidence; moreover, much of defendant's evidence substantiated

plaintiff's prima facie case.[9]

In rebuttal, defendant's evidence falls short of the standard required by *Turner* and *East*. Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *East* found such unsubstantiated assertions of "qualification" and "prior work record" insufficient absent data that will allow a true *comparison* of the individuals hired and rejected. Plaintiff's evidence showed that she supervised Walz before her discharge; defendant admitted that she had more seniority and knowledge of the PSC program than Walz. After her employer placed her in a position of great responsibility without the necessary authority to deal with recalcitrant staff personnel, the employer seems to have discharged her for not being able to do the job smoothly and hired a less experienced male for the job.

Defendant's bald assertion that Walz was "qualified" will not support the district court's holding if we employ *East's* rebuttal standard. Neither will defendant's reliance on subjective evaluations and recommendations by subordinates, *see, e.g., Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976),

[9]Fuller admitted that Burdine had more experience in manpower programs than Walz and had trained Walz for the job he held before her discharge.

particularly where the employer must take some responsibiity for the "friction" between plaintiff and staff personnel and where no comparative data were introduced to evaluate either Walz' behavior in the same situation or his relationship with the two employees who were discharged along with the plaintiff.[10]

Defendant relies heavily on the fact that DOL mandated the reduction in staff and also required TDCA to submit the name of the Project Director and the other proposed personnel changes to DOL for approval. The trial court likewise seems to have relied on this intervention by DOL and DOL's eventual approval of the actions taken with regard to plaintiff. However, defendant's evidence failed to show that DOL would not have approved plaintiff as Project Director or that DOL required or even suggested to TDCA that it terminate plaintiff and retain Walz.

To say that defendant's decision was rational begs the issue; an employer may be rational and still intend to discriminate on account of race or sex. Plaintiff successfully proved intent by making out a prima facie case against TDCA on this issue, and defendant's evidence is insufficient to rebut the proof of intent here. Thus, since TDCA failed to rebut plaintiff's prima facie case as regards her discharge and Walz' retention, we must reverse the trial court on this issue.[11] We remand

[10]The problems within the PSC staff predated Burdine's assumption of the Project Director's duties. At least one of the two persons terminated along with Burdine had caused Nealy, before he resigned, considerable difficulty, and Nealy expressed, in a letter to Fuller, grave concern about the employee's behavior. Burdine later encountered problems in dealing with the same employee and detailed them in a memo to Malone.

[11]While the trial court failed to make specific findings either that plaintiff established a prima facie case or that defendant was successful in rebuttal, we need not remand for further fact findings on liability, since we find that a prima facie case was made out as a matter of law and that defendant's proof falls far short of rebuttal standards set by our case law.

this issue to the trial court for determination of damages and attorney's fees.

The Equal Pay Claim

Plaintiff contends that TDCA violated her rights under the equal pay provision of Title VII.[12] The last sentence of that provision incorporates the defenses found in the Equal Pay Act.[13] That Act allows pay differentials if based on unequal skill, effort, or responsibility[14] and articulates four defenses. The only

---

[12]42 U.S.C. § 2000e—2(h) states:

Notwithstanding any other provision in this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. *It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards act of 1938, as amended.*
(emphasis added).

[13]29 U.S.C. § 206(d).

[14]The Ninth Circuit recently held that Title VII is broader in scope than the Equal Pay Act and that the latter applies only where plaintiff contends there has been a denial of equal pay for equal work. *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979). In a case involving comparable but not substantially equal work, only the Equal Pay Act's four affirmative defenses, but not its equal work requirement, are incorporated into Title VII. *Id.* Since plaintiff here claims to have done substantially equal work, we need not decide now whether we would follow the lead of that circuit.

defense arguably applicable here is that the unequal pay was not based on sex.

Plaintiff's burden in this pay case is to prove that a wage differential is based on sex and that there was performance of equal work for unequal compensation. *Orr v. Frank R. MacNeill & Son*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975). The job need not be identical, only substantially equal. *Id.*

The plaintiff's evidence showed that she was given additional duties and responsibilities after Nealy resigned and that she fulfilled substantially all of the functions of Project Director. Testimony and other evidence showed that Nealy, before he resigned, made $1,179 per month as Project Director; Burdine received no raise and continued making approximately $900 per month after she assumed most of his duties. Malone, Nealy's supervisor, was given a raise during this time period, ostensibly to compensate him for his added duties as "acting director," most, if not all, of which duties he had delegated to Burdine. Watts' salary on assuming the Project Director's post was $1,259 per month.

We think this evidence, if credible, establishes a prima facie case of discriminatory pay differential. Her factual proof tends to establish that her employer paid her "at a rate less than the rate at which he pays wages to [male] employees . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . ." 29 U.S.C. §206(d); *see Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971). However, some of defendant's evidence, if credible, tended to show that the work was not equal.[15]

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[15]Fuller testified that he did not regard Burdine as acting Project Director and that other people had some responsibility for PSC's administration.

The trial court made no finding that plaintiff had (or had not) been doing work substantially equal to that of the Project Director. It recognized that she had been assigned extra duties but stated that "the evidence . . . indicates that other individuals within TDCA, both male and female, have on occasions been temporarily given additional duties without any increase in pay or promotion." The court thus found that plaintiff had failed to prove the pay differential was caused by sex discrimination.

We must remand this issue to the district court. On remand the court should make specific findings on whether plaintiff established a prima facie case and, if so, whether defendant successfully rebutted that case with evidence showing either that the work has not substantially equal or that the pay differential was based on a factor other than sex. We would observe here, however, that if the work is substantially equal, a bare, self-serving, general assertion that employees are frequently assigned extra duties at no increase in pay will not serve to rebut a prima facie case. This is true especially in light of plaintiff's documentary proof that she assumed extra duties for about six months; that her pay was substantially lower than the two male employees who did that work before and after her; and that her male supervisor received additional compensation for "increased responsibilities and work load," yet she, not he, assumed some of those burdens. More specific facts are needed to rebut this evidence: How long were other employees required to perform extra work? What were the pay differentials involved on the other occasions? What was the sex of the employees in the other instances?

In conclusion, we summarize our holding. The trial court's finding that there was no sex discrimination in defendant's appointment of Robert Watts as Project Director is affirmed. We do find that defendant discriminated againt plaintiff on account of her sex

when it terminated her and retained and promoted Allen Walz. On remand the trial court should award plaintiff back pay based on Walz' salary for the months during which plaintiff was not employed by defendant, mitigated by any other earnings or unemployment compensation plaintiff may have received or that it concludes she should by reasonable efforts have obtained. *See Guerra v. Roma Independent School District*, 444 F.Supp. 812, 822 n.9 (S.D.Tex. 1977). We also remand for the trial court to enter findings on whether plaintiff established a prima facie case under the equal pay provision of Title VII and, if so, whether defendant's evidence rebuts that case.

Since plaintiff has prevailed on one issue, the trial court should also consider the matter of awarding attorney's fees; such fees should ordinarily be recovered by prevailing Title VII plaintiffs in all but special circumstances. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 698, 54 L.Ed.2d 648 (1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716 (5th Cir. 1974).

AFFIRMED in part, REVERSED in part, and REMANDED.

Supreme Court, U. S.
FILED
MAY 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

September Term, 1980

NO. 79-1764

* * * * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

V.

JOYCE ANN BURDINE,

Respondent,

* * * * *

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * *

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * *

Petitioner, Texas Department of Community Affairs, respectfully prays that the Court consider this supplement to Petitioner's Petition for Writ of Certiorari.

It has come to the attention of counsel for Petitioner that the United States Court of Appeals for the First Circuit has recently interpreted this Court's opinions in *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978) and *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), in a way which conflicts with the holding of the United States Court of Appeals for the Fifth Circuit in the case at bar. In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Court stated:

> We think it now clear that *McDonnell Douglas* leaves the burden of persuasion at all times with the plaintiff, and that the employer's burden to "articulate" a legitimate, nondiscriminatory reason is not a burden to persuade the trier that he was in fact motivated by that reason and not by a discriminatory one. Rather it is a burden of production---i.e., a burden to articulate or state a valid reason, following which the complainant must show that the reason so articulated or stated is a mere pretext or "cover-up" for what was in truth a discriminatory purpose.

This interpretation of *Sweeney* and *Furnco* by the First Circuit clearly conflicts with the holding of the Fifth Circuit in this action that the Defendant in a Title VII case must prove by a preponderance of the evidence that it relied on a non-discriminatory reason in making a challenged employment decision.

This Honorable Court should grant the Petition for Writ of Certiorari, for the reasons stated in the original Petition and for the additional reason that it would eliminate this conflict between the Circuits.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Supplement to Petition for Writ of Certiorari has been served upon attorney for Respondent by placing same in the United States Mail, certified, return receipt requested, addressed to Mr. Hubert L. Gill, P.O. Box 777, Austin, Texas 78767 on this the _____ day of May, 1980.

_____
LONNY F. ZWIENER

Supreme Court, U. S.
FILED
NOV 18 1980
MICHAEL RODAK, JR., CL

NO. 79-1764

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner

vs.

JOYCE ANN BURDINE,
Respondent

JOINT APPENDIX

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* * *

Q. Okay. How are you employed at this time?

A. I'm employed as a Field Services Coordinator at the Texas Department of Community Affairs in the Manpower Services Division.

Q. Okay. And when did you first begin your employment with them?

A. I first began my employment January the 15th of 1972, as the Data Analyst for the Public Service Careers Program for the Texas Department of Community Affairs.

Q. Okay. Would you explain to the Court what the Public Service Careers Program is.

A. Okay. The Texas Public Service Careers Program is a program whereby federal funds are used to contract with State agencies. The State agencies provide unsubsidized jobs that are budgeted positions for unemployed people, and also the money is used to upgrade present employees who are in low-paying, low-skilled jobs. And the money is primarily used

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for training those people on the job.

Q. Now, subsequent to your first date of employment, January the 15th of 1972, did you later receive a promotion?

A. Yes, I did. I was promoted in July of 1972 to the position of Job Design Coordinator.

Q. And what did you do in that position?

A. I continued most of the duties that I had as the Data Analyst, since most of the duties that I had assumed on that job were not in the job description but were in addition to what was in that job description. That was, I assisted in the negotiation of proposal development, in contract development, I assisted the director whenever we met with heads of agencies and I develop contracts. I also was responsible for amending the contract with the Department of Labor. I went to the Department of Labor, in Dallas, and took it, explained it, corrected it for funding. I kept records. I made monthly reports to the Department of

Labor and I worked up training plans for the participants who were employed in the State agencies in the programs.

Q. Who, at that time, subsequent to July the 1st of 1972, was your supervisor in the PSC Division?

A. Mack Nealey.

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Q. And can you tell the Court whether on or about October the 2nd of 1972, were you given any kind of specific job duties other than what you had had in the PSC Division?

A. Yes, I was. Mr. Nealey had told us that he was going to resign in approximately two weeks and that he would be out of the office a lot of that time, and he designated me to be in charge of the office to represent the Public Service Careers office at meetings to administer the program, and to sign leave slips for the State office staff and generally to run the program from the State office.

Q. Would you identify what has been marked as Plaintiff's Exhibit 2-B.

A. Yes. This is that memo.

MR. ALLEN: No objection.

(Said instrument was admitted in evi-
(dence as Plaintiff's Exhibit No. 2-B.

Q. (By Mr. Gill) Subsequent to that time, which was October the 2nd of '72, did you assume that authority that was given to you?

A. Yes, I did.

Q. Now, on or around that time, were you made aware of any change in the PSC Division as to who the acting

(6)

director of that program would be?

A. Yes, I was. Shortly after that, around October the 16th, shortly after Mr. Nealey left, we were notified in the State office that John Malone was made the acting director of the Public Service Careers Project.

Q. Okay. Would you identify what has been marked as Plaintiff's Exhibit 2-C.

A. Yes. This is the memo that designated that.

Q. Did Mr. Nealey, to your knowledge, in fact, resign from the PSC?

A. Yes, he did.

Q. Okay. Now, subsequent to his resignation, did you—who was your boss then?

A. John Malone was my supervisor at that time.

Q. Okay. Did you receive any specific instructions from Mr. Malone concerning your job duties in the PSC Division?

A. Well, shortly after he was designated as acting director, he passed a memo on to me and to the State office staff designating that I administrate and be responsible for the State office staff and the duties of the Public Service Careers Project in that office.

Q. Would you identify what has been marked as Plaintiff's Exhibit 2-C.

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A. Yes. This is that memo.

Q. And, 2-E is what that is, I'm sorry. Would you explain to the Court what sort of activities you did in that job after you had received those instructions from Mr. Malone.

A. I coordinated all of the administrative functions of the office, I supervised the staff, I scheduled travel statewide, I visited the statewide projects where we had contracts and set up monitoring schedules for the contracts, I signed time and attendance sheets, and all of the normal office routine that you do with the staff.

Q. What contact, if any, during this period of time did you have with Mr. Malone, himself?

A. Very little, actually. We had approximately two staff meetings within a period of about six months, and I requested one of those. The rest of the time whenever I needed help I would call and request assistance or request answers to questions that I had, and he would respond by telephone. But we rarely ever saw him.

Q. Would you say that, in effect, you were totally in charge of that division?

A. Yes, I would say that I was.

Q. Is one of the things that you did while you were . . .
* * *

(9)

A. Yes.

Q. And Marion Kirkland?

A. That's correct.

Q. Would you identify what has been marked as Plaintiff's Exhibit 7.

A. Yes. These are time and attendance reports with my signature on several of them.

Q. Now, concerning these time and attendance records, I believe your signature is not on all of these, is that correct?

A. That's correct.

Q. Now, your—I believe, for example, here is one that is marked November of '72, in which you have signed in the space marked "Supervisor's Signature," is that correct?

A. That's correct.

Q. And some of the others—That is for the employee, Allen Walz.

A. Yes.

Q. Some of the others you have marked—or have been signed, for instance, by John Malone in September of '72, is that correct, for Allen Walz?

A. Yes, it is.

Q. And those signatures reflect the supervisor of that project or program at that time.
* * *

(11)

A. No, I can't.

Q. Now, did you at any time while you were holding this position, from November the 8th of 1972 until April 1st or so of 1973, receive any kind of pay increase?

A. No, I did not.

Q. Did you receive any kind of a promotion?

A. No, I didn't.

Q. Did you at any time request either a pay increase or a promotion?

A. Yes, I did.

Q. Can you say when you did that?

A. I applied for the Director's position on December the 15th of 1972. I discussed it verbally with John Malone and he encouraged me to apply for it, and he told me that as far as he was concerned he would approve it and that the ultimate approval would have to come from the Executive Director of the agency, who was Mr. B. R. Fuller; and he said that he would talk to Mr. Fuller about it and that was the only thing we needed to do at that time. Later I reminded him of it again and asked him if I needed to do anything in writing, there was a contract modification that I was working on, and he suggested that I present it the same way that it was presented

(12)

whenever he was the Director of the program. I asked him how that should be done and he told me to insert my resumé in it and to include the Director's—the PSC Director's position in the budget, told me what salary to figure to budget in for and everything. And he said that that's the way he would present it to Mr. Fuller for his approval.

Q. Did you do that?

A. Yes, I did.

Q. Did you ever hear any response concerning that?

A. None whatsoever.

Q. Would you identify what has been marked as Plaintiff's Exhibit 2-K.

A. Okay. This is the memo that I wrote to Mr. Fuller calling to his attention certain items and the fact that I had applied for the position and had no response on that, and I was bringing it to his attention.

Q. I'm going to read from the first part of the third paragraph, and correct me if I'm wrong: "On submission of the last modification of the PSC contract, December 15, 1972, I applied for the position of Project Director of PSC. John Malone verbalized his approval but stated that he would need to 'clear it with Mr. Fuller.' As of November 8th of

(13)

1972, I have been working in the capacity of Project Coordinator without benefit of a salary increase. My salary is the third highest in the State PSC office; the two other employees making higher salaries than I earn. I am available to discuss this matter and other PSC concerns with you at your convenience." Is that correct?

A. That is correct.

Q. Did you ever get any response from this memo?

A. None whatsoever.

Q. Okay. Now, did you know—Would you identify what has been marked as Plaintiff's Exhibit 2-D.

A. Okay. This is the Personnel Action Form for Mack Nealey.

Q. And it reflects the date of his resignation.

A. Yes.

Q. Okay. Is it correct that this reflects Mr. Nealey's salary at the time of his resignation to be $1,179.00 per month?

A. That is correct.

Q. And you were being paid at that time at a rate of pay of what?

A. It was $800 and something a month; I'm not exactly sure how much it was. I believe it was $848.00.

Q. Would you identify what has been marked as Plaintiff's . . .

* * *

(28)

. . . any other job there that you would have considered taking.

A. I would have considered the Area Coordinator position that was given to Allen Walz.

Q. And Allen Walz was a male?

A. Yes, he was.

Q. And what—Prior to your termination, what was his relative position in the PSC division as compared to yours?

A. He was the Data Analysis in the Public Service Careers project, and I trained him for that position.

Q. Did you supervise him?

A. Yes, I did.

Q. As far as seniority, what was your rate of seniority to his?

A. I had seniority with the agency of about a year. I had five years of experience in manpower that he did not have. He had the one year in manpower that he had been there.

Q. Is Mr. Walz one of the persons on the earlier exhibit, that was the time and attendance sheets, that you had approved his time and attendance sheet?

A. That is correct.

Q. And you did that as his supervisor?

* * *

(52)

. . . by the Court first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GILL:

Q. Would you state your name, please.

A. Julius Gordon, Jr.

Q. And what is your occupation?

A. I'm the Associate Dean of Students at the University of Houston at Houston.

Q. Okay. Do you know the Plaintiff, Joyce Burdine?

A. I do.

Q. How are you acquainted with her?

A. I'm acquainted with her from my employment and her employment with the Public Service Careers program. I was the Coordinator for the University of Houston's program for two years.

A. Is that what is referred to as an "out-station staff person?"

A. Yes, it is.

Q. And you worked in conjunction with the central office in Austin, in terms of administering the program?

A. I did.

Q. And what—Can you tell the Court, briefly, what the purpose of the program was?

A. The program was geared to—not only for the University but for the entire state—was the

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upgrading of staff members at the particular site, for the bringing in of the minority of women into the program and for the elimination of barriers which would have kept people from getting employed by them not having a proper education or what have you. If I may, I'll give an example of this: One of our, what we call "substatatory staff," an employee which we have at the University of Houston who was classified as a clerk typist. However, what she actually did was grade the work of optometry students and which this was quite difficult for her. And working through the program we got her the proper training, the course needed, she was not a college graduate, and she tripled her salary and she was made an Optician.

Q. Okay. And for what period of time did you work in the PSC program?

A. Two years. From its onset. I believe it was August of '72—I'm sorry—late '72.

Q. During that period of time, particularly from January of '72, the date of Ms. Burdine's employment, through the time that you left, did you have close contact with her as far as your job was concerned?

A. I did.

Q. And what did your contact and her's—

(54)

A. Well, in her—She held various positions during this particular time, one was that of a Data Analysis, I believe, and the other was as a trainer. She assisted us with the modification of contracts, the evaluation of our work in which we were doing and the general on-sight visitation which was required of the staff from the State office.

Q. Did you have—Were you able, during that period of time, to closely observe her work?

A. I was.

Q. And what did you observe as far as her work?

A. I observed her as being a very positive individual and one who could do the job.

Q. Could you give some specific examples?

A. Why, yes. I have some background working with the Department of Labor, even prior to this particular program, and I know the many tons of paper work which one must go through in terms of dealing with modification of contracts. This she was able to do quite easily. She was able to assist us in getting those things past, which we probably would have ran into a little bit of difficulty. She also assisted us in getting reimbursed for our costs incurred while training individuals.

Q. Would you say that based on your personal observations

(55)

of her work performance that she was qualified or not qualified to be the Project Director of that division?

A. I would not hesitate to say that she was qualified to be the Director. She was a person which me and my staff called upon for assistance from the office.

MR. GILL: Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. ALLEN:

Q. Mr. Gordon, did you ever work with her in her office here in Austin?

A. We had a few occasions to come to Austin. Like on the occasion that I did we had several training-type of meetings. Most of the time it was on-sight and by communication through the mail and by phone—mostly done on-sight.

Q. But did you ever observe her in her position in the PSC program there, in her work here in Austin?

A. You mean her—physically located in Austin?

Q. Yes, sir.

A. I guess I could say the times that I was here, I observed her going about her work daily when we were here for our business. Of course, we would be her business.

Q. But you would be conferring with her on these . . .

* * *

(57)

Q. Do you know the relationship between Mr. Fuller and Ms. Burdine?

A. With Mr. Fuller and Ms. Burdine? No, I didn't.

MR. ALLEN: Pass the witness.

MR. GILL: No further questions. Your Honor, I call Mack Nealey.

MACK NEALEY,

a witness produced by the Plaintiff, having been by the Court first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GILL:

Q. Would you state your name, please.

A. My name is Mack D. Nealey.

Q. And what is your present occupation?

A. I'm a Center Coordinator of the Kealing Learning Center, which is part of the Austin Independent School District.

Q. Do you know the Plaintiff, Joyce Burdine?

A. I do.

Q. And how do you know her?

A. I recruited and hired her in the position of Data Analyst for the Texas Department of Community Affairs.

Q. Okay. When were you employed at the Texas Department

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of Community Affairs?

A. Approximately from July, 1970 to October, 1972.

Q. And what was your position in that?

A. Initially, I performed the duties as Job Design Coordinator and later I received an appointment as Acting Project Director of the Texas Department—Public Service Careers program, and later as a permanent Project Director of the Texas Public Service Careers program.

Q. Would you identify what has been marked as Plaintiff's Exhibit 11.

A. Yes. This is a Personnel Action Form accepting my promotion to a permanent Director of the Public Service Careers program.

Q. And that's dated January 15, 1972, is that correct?

A. Yes.

Q. Okay. Now, in your—You say that you recruited Joyce Burdine for that job; what brought that on?

A. I had talked with numerous individuals in the Austin area concerning appointment of someone for that position, and Joyce Burdine had been highly recommended for the position. And, after numerous interviews and contacts with her, I had no doubt as to her ability to perform this position. She demonstrated to me during the interviews the

necessary—in communicating with her—the necessary knowledge, skills and abilities required for this job. And, that is primarily the reason that I chose her for this position.

Q. Okay. After she was recruited and hired, did you have occasion then to observe her performance in this?

A. I did.

Q. Would you explain to the Court how you observed her performance.

A. Well, basically as a Project Director I have been delegated the authority for the administration and implementation and operation and coordination of the—as well as supervision—of personnel of the Service Careers program. I supervised Ms. Burdine on a daily basis. She demonstrated over and beyond the necessary knowledge of skills and ability as a Data Analyst. And during this time I assigned her additional duties which were not stipulated in her job description, and she performed those without any difficulty. And I also gave her additional responsibilities to coordinate many of our field activities with the sub-contracting agencies around the state of Texas, and she performed those without any difficulty.

(60)

And during my visits to those cities and to those sub-contracting agencies, I received very favorable comments concerning her performance during those visits.

Q. Did you actually, at one point, give her authority while you were out of the office, at times when you were out of the office, to be in charge of the office?

A. I did.

Q. What, based on your personal observations of Ms. Burdine's performance, was your opinion as to her ability and qualifications to have the job as Project Director whenever you resigned?

A. I have no difficulty in recommending to her to initiate the proceedings for this position. I also communicated with John Malone concerning the possibility of appointing—consideration of appointing Joyce Burdine for this position.

Q. What was your conversation with Mr. Malone?

A. Basically, I considered her as sort of heir apparent for the position since she had demonstrated, beyond a shadow of a doubt, the ability to perform those duties.

Q. Did you recommend to John Malone that she be made the Project Director?

(61)

A. Yes, I did.

Q. And what was his reaction?

A. He agreed with me that she did possess those knowledge of skills and abilities in the job description. We did not talk at length and, of course, he said he would pursue the matter further with Ms. Burdine. Of course, after my departure from Austin I had no further knowledge as to what actually took place concerning that.

MR. GILL: Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. ALLEN:

Q. Mr. Nealey, when did you depart from Austin?

A. Approximately in October of 1972.

Q. October of '72. And you're not aware, or do not have any knowledge, of the difficulties that the PSC project was having with the Department of Labor—

A. No, I did not have any—

Q. —that resulted in the Department of Labor's determination that the project should be terminated?

A. None that I could intelligently speak of. Of course, by rumor—

Q. You have no actual knowledge of this?

A. No actual knowledge whatsoever.

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MR. ALLEN: No further questions.

MR. GILL: Delores Giles.

DELORES GILES,

a witness produced by the Plaintiff, having been by the Court first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GILL:

Q. Would you state your name, please.

A. Delores Giles.

Q. And what is your occupation?

A. Record Specialist.

Q. For where?

A. Texas Department of Community Affairs, Manpower Division.

Q. Okay. When did you become employed with the TDCA?

A. The Public Service Careers—I started first with the Public Service Careers—which was in 1970, July the 16th.

Q. Okay. And were you there at the time that Joyce Burdine was hired?

A. Yes, I was.

Q. Who was the Director at that time?

A. When I first started it was John Malone.

Q. Okay. And later, Mack Nealey took over?

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A. Right.

Q. Now, during this period that we've discussed, between November the 8th of 1972 and April the 1st of 1973, were you employed in the same office with Joyce Burdine at that time?

A. Yes, I was.

Q. And what was your job at that time?

A. Clerk Typist II.

Q. Okay. Were you in a position to observe what was happening in the office at that time?

A. Yes. We were all a little excited and worried about our job positions, because it was a rumor that the program may not be extended.

Q. Now, after the time that Mack Nealey left, which was on November the 8th of 1972, what was your understanding, as an employee there, as to who was in charge of the office?

A. Ms. Burdine was in charge.

Q. What kind of things did she do that would show that she was in charge?

A. The regular duties that a supervisor or Project Director would do. She checked with the clerical position to see if her job was done, did she have anything to go out. At that time I was also keeping the supplies, so she would check and see if we

(64)

needed any supplies and things like that.

Q. Okay. Did she approve time and attendance sheets?

A. Yes, she did.

Q. Vacations?

A. Yes.

Q. And she approved all the letters and correspondence that went out?

A. Right.

Q. Based on your observations of her during that period of time, can you say in your opinion as to what kind of a job she was doing?

A. A great job. I think everybody got along with her.

Q. Had you heard or did you know who would be—Whenever you found out that the program would not be terminated but would be refunded, did you know who was going to be the new Project Director?

A. At first we didn't. Nobody knew anything, to be honest.

Q. And then later, what did you find out?

A. Later, when we found out that we were going to move, I think John came over and told us that we were moving into the new building, which was located 611 South Congress. That's when we found out that we would have a new Project Director out there.

Q. And, then, when did you find out who the Project

(65)

Director was?

A. When we moved over there.

Q. And that was when you found out that Bob Watts was the Project Director.

A. Right.

Q. Were you there during the same period of time that Bob Watts was employed as a Project Director?

A. That's right.

Q. And is he still in that position right now, to your knowledge?

A. No. PSC is not going on now; it became Manpower.

Q. And his job duties have changed?

A. Yes.

Q. Now, during the time that you were able to observe both Joyce Burdine and Bob Watts, based on your own personal knowledge, can you give an opinion as to the relative job performance of both of them?

A. Well, I would have to say that Ms. Burdine knew more about the program because she's been there longer. And I was there before she came, so I knew—being with the Project Director, I would say that she was more qualified for it.

Q. Had you thought, in fact, that she was going to get that job?

A. I did.

(66)

MR. GILL: Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. ALLEN:

Q. Ms. Giles, what is your basis for the analysis that Ms. Burdine was more qualified than Mr. Watts?

A. Sir, I didn't know Mr. Watts, I didn't know his qualifications, but I did know Ms. Burdine because I worked there. And I was in there with Mr. Malone and Mr. Mack Nealey, so I knew what a Project Director had to do. So, I didn't know Mr. Watts.

Q. But you did work under him?

A. No. I said I worked under Mack Nealey and Joyce Burdine and John Malone. I didn't know Mr. Watts at all.

Q. You haven't worked under Mr. Watts?

A. I worked under Mr. Watts after he moved over in April, but I didn't know him at the beginning.

Q. Well, after April, then, when you did work under him, did he appear to do a good job?

A. I guess he did.

Q. But you would have preferred Ms. Burdine?

A. Yes, because I—Yes.

Q. She is a personal friend of yours; isn't she?

A. Not really. She's a personal friend of mine, sure enough. But I did—I think working with . . .

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(73)

Q. All right, sir. Mr. Fuller, you have heard the testimony and you were involved in the problems that the Public Service Careers division was having with the Department of Labor. Now, was the Public Service Careers division a wholly funded project of the Department of Labor?

A. Yes. It was funded by the Department of Labor.

Q. Were there any State funds involved?

A. Not to my knowledge were there any State funds involved. It was all U.S. Department of Labor funds.

* * *

(77)

. . . Now, you can ultimately say this is my responsibility as Executive Director, but since the witness today has testified that she felt that she was running the project, I think that some of these possible deficiencies could be attributed on down to the level of the PSC project, itself. So, for the example of lack of proper documentation of expenditures, payments made on expired contracts, expenditure accruals are not accurate, enrollee certifications are inaccurate, enrollees in the programs who shouldn't be in the program. Now, these are the people who were doing the day-to-day work, and these are things that I think should have been taken care of down at that level.

Q. And Ms. Burdine was on that level?

A. Ms. Burdine and the rest were on that level. So, I had to take this into consideration.

Q. All right, sir.

* * *

(79)

Q. All right, sir. Now, how did you determine that Mr. Watts would be the best qualified person for that Director's job?

A. I interviewed some of the top key people who had been with the agency a long time and asked them to give me names of people; we got those names, looked at the resumés and sifted through them as to who would be the person.

Q. All right, sir. And what were the considerations,—the factual basis considerations, of Mr. Watts that

(80)

you took into account to determine he would be the most appropriate.

A. He was highly recommended. And number two was that he had previous administrative experience. He had advance—he had some advanced degrees in Administration and in Accounting. He had other qualifications that I felt made him qualified. I felt that we had to be completely

objective. In no instance did I feel that personalities or sex or any type of discrimination should be involved in this; that we had to go completely on an objective analysis of a person who could take the program and put it together.

Q. And knowing that DOL had to approve all these people, well, you sifted them over with a fine tooth comb to determine who you thought was best qualified?

A. Well, I knew that I had to submit a person that would be acceptable to D. of L.

Q. All right, sir. And what reorganization plan did you come up with, then, besides Mr. Watts as being Project Director?

A. Well, then the reorganization plan came up in conjunction with how they—We worked with Watts, and all of us worked with some of the D. of L.

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representatives as to the contracts that were going to be modified or the training that was going to be eliminated and the type of people that we would need.

Q. All right, sir. And how was the decision made to promote Mr. Allen Walz?

A. It was based on, I felt, his qualifications. I felt that he was qualified to do that, and it was approved by D. of L.

Q. All right, sir. You say "his qualifications." Now, do you have a resumé or something on him to—

A. I don't have it with me, I don't think. I may have it with me. Allen Walz had previous experience. He was recommended by the people who he had worked with in the field and he had been recommended by the people who were—that I was depending on to give me some names of people who should be put into positions of added responsibility.

* * *

(83)

Q. All right, sir. Now, Mr. Fuller, you have made the decision that Ms. Burdine would be terminated; on what basis was that decision made?

A. A very hard decision, as it is to terminate anyone.

But it was a decision to—that in my opinion, was based on the best interest of the program because I felt that there had been some concern, there had been some friction within the department—within the PSC program—and I felt that this could be overcome if she were not continued in the program during this traumatic reorganization period.

Q. And that did prove out to be right?

(84)

A. In my opinion it did.

Q. All right, sir. Now, that was also part of DOL's requirement, was it not, that there be a reduction in force?

A. That is correct.

Q. And how many had to be reduced?

A. I've forgotten what the number was, but they specified a number, and it was reduced to their staff—to their level requirement. And it was worked out with the people with D. of L.

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(87)

Q. All right, sir. In the reduction in force, how many others were terminated in the PSC project?

A. I believe—I can't be certain about this. I think there were three, a total of three.

Q. A total of three.

A. I think it was a total of three; it may have been more.

Q. All right. Do you recall the names?

A. Well, Ms. Burdine—Let's see. Kirkland, I believe was, and Caraveo.

Q. All right, sir.

* * *

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* * *

Q. Okay. Now, I believe you testified yesterday, concerning some of the problems in the PSC project that brought on this possible termination of the project and the

communication from the Department of Labor, concerning what changes needed to be made in the negotiations. One of the things you brought out were possible deficiencies in the program, which was based on that letter from Mr. Johnson to yourself, which has been entered as Plaintiff's Exhibit 2-T. Now, was there anything to those deficiencies, I believe there's about 17 of them, that you as Executive Director attributed the blame or the responsibility for to the Plaintiff, Joyce Burdine, and, if so, what were those?

A. Well, I think that what you have here, Counselor, is that you have a list of deficiencies which were brought out through a review by the Department of Labor, and then contingent on that were certain things that the Department of Labor mandated for the continuation of the project. Specifically, I don't understand your question, now. Would you

(90)

Q. Okay. Was there any—are there any of those deficiencies or problems that were listed in that letter concerning the PSC project that you, as Executive Director, attributed to the Plaintiff, Joyce Burdine, as Project Coordinator during that period of time? And, if so, which ones were they?

A. Well, it would be difficult for me to single out things here that I could contribute to "an individual." However, I think that there are certain things in here that would be assumed in the role that Ms. Burdine had under Mr. Malone, as being sort of Coordinator of the project, of lack of communication in the PSC staff, and some of the others that are here. Now, whether or not the communication could be entirely contributed to Ms. Burdine, I can't say. This could be a lack of communication even from my office to that office.

Q. Okay. And so—

A. I would say that there are several here that tie back in. And here, Counselor, I have to rely upon some communications that I had with D. of L. staff that are not documented. These were verbal communications that we had

between us, that indicated that they were dissatisfied with the manner in which the project was being operated, which brought about the

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recommendation number three of curative actions which had to be taken, and that was that there had to be a complete reorganization of the PSC staff.

Q. Okay. Now, I believe that one of the problems that—or one of the recommendations that they made was that a Project Director be named; is that correct?

A. Right. That is correct.

Q. And is it not true that many of the problems in the PSC division at that time could be attributed to the fact that there wasn't a Project Director?

A. That is not unquestioned, and I think that you could make that assumption.

Q. Okay. Now, on the specific thing of lack of communication, which is the only one that you've mentioned, I believe that you testified that you did not attribute that to Ms. Burdine in particular, or Mr. Malone, but it was just a common problem that everyone had; is that correct?

A. I think that you're probably paraphrasing what I said just a little bit. I said that I think that it could have been any one or more of the staff people who were not coordinating with each other. But as the person who was acting under Mr. Malone in a capacity of sort of supervising the staff, I felt that this would be a problem which could be

(92)

contributed to an attempt by Ms. Burdine to effect this type of coordination in this type of communication. And if it could not be accomplished then to call on Mr. Malone and to call on me as the ultimate responsible person—

Q. Was there any specific—Excuse me.

A. —in the coordination.

Q. Was there any specific example of the lack of communication that you can give us that you recall?

A. Not off-hand, no.

Q. And you were aware that Ms. Burdine had filed numerous monthly activity reports?

A. Yes, which were required.

Q. Okay. Now, the complete reorganization that DOL talked about, did anyone specifically from the Department of Labor require you, either in writing—in writing, exactly what they meant by "complete reorganization." Did they say that everyone there was to be terminated or how did you interpret the meaning "complete reorganization?"

A. I took it in its liberal sense. And that is what they were talking about was that they were talking about a complete reorganization. I just took it in its total context, as was put out in here, and took a look at the attending requirements that they . . .

* * *

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Q. Did anyone from the Department of Labor ever tell you—instruct you that they would not approve Joyce Burdine for the job as Project Director if she were named?

A. The Department of Labor only instructed me that I had to get the approval of them for the person who was named as Project Director.

Q. So, no one ever told you that they would not approve her if she were named; they just waited for you to submit the name and they would approve it?

A. I think the Department of Labor waited for me to submit a name to them for approval.

Q. Okay. Now, you mentioned yesterday, too, in your testimony some dissension that was in the project. Is there any dissension that may have existed that you attributed the fault to Joyce Burdine?

A. Well, this is a difficult question to answer as to whether or not the dissension—Dissension between any two individuals—individual "A," individual "B" in a project has to be cleared up if there is to be harmony and good working relationships in that organization. And if, in fact, Ms. Burdine was

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acting as a person under Mr. Malone in trying to coordinate the project then I think it was her responsibility to reconcile any differences which might have existed.

Q. Okay. What, specifically, are you referring to in terms of some dissension?

A. Well, it was just verbal—just by word of mouth—and other things that had come across my desk.

Q. I mean, what specifically should she have done or could she have done that she did not do to clear up any possible dissension?

A. Well, you're asking for an interpretation of an administrative person to clear up something, and I think this is an area where you have to take each individual instance and act on it as that action arises. I think one of the things that probably, if I might revert to, I think, another exhibit that you have introduced, was the fact that there was some indication here when Mr. Malone required that all travel and all contacts with the regional office and other things be cleared through him or through me. And I think that this was an indication that there could have possibly been some indications that there was not harmony in the area.

Q. Well, isn't it correct that the—that all travel

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had to be cleared through him or through you anyway; is that correct?

A. Well, ultimate—Excuse me.

Q. I believe the memorandum of November the 8th, that we've referred to from Mr. Malone, specifically—this was prior to Ms. Burdine becoming the Project Coordinator, specifically limited and did not give her the authority to approve travel. Isn't that something that only a Project Director could do anyway?

A. Well, yes. But ultimately what I did was that I even required that all travel be approved by me, but this was at a later date.

Q. Are you referring specifically, when you mentioned dissension, to anything concerning another employee by

the name of Roberto Caraveo?

A. This was one instance, yes.

Q. Okay. And in what way did you attribute, if any, any fault to Ms. Burdine concerning Roberto Caraveo?

A. Well, in a memorandum to me under date of February 20, 1973, Ms. Burdine recommended that I limit Mr. Caraveo's activities as a result of an alleged charge, which he had which had not come to trial. I had already checked this out with the Attorney General's office as to what I should do in this

(97)

instance. And the Attorney General instructed me that I was to take no action until the person was either adjudged guilty or—that the very fact that a charge had been filed did not constitute reason for me to treat him in any manner other than any other employee.

Q. And that was an alleged charge of sodomy; is that correct?

A. That is correct.

Q. And is it correct that to your knowledge Mr. Caraveo later pled guilty to that charge?

A. I can't answer in the affirmative.

Q. Okay. I believe that memorandum—do you have that specifically in front of you, the one that you were referring to—

A. Yes.

Q. —states that she recommended that he be transferred until his guilt or innocence could be established, and relocated to a position that didn't require him to travel or to represent the TDCA in the public until the charge was settled one way or another; is that what you're referring to?

A. This is what I'm referring to.

Q. And that is, you think, an improper suggestion on her part?

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A. I do not question her suggestion. My response to it is

that immediately upon being notified by this that I contacted the Attorney General's office and asked what I should do in this instance; I was informed by the Attorney General's office that unless his guilt were proven, that I should do nothing. And so I felt that my hands were tied to either—because it could be construed by this person that I had taken an improper action in curtailing his activities.

Q. Okay—

A. And I felt that I was following legal advice and I did not feel that I should question this advice.

Q. Now, was that the first time that you were aware of any problems with Mr. Caraveo?

A. Well, if I answer in the affirmative it would be—I think I would have to say that most of it was by word of mouth, and I don't think that it is possible to give testimony like that.

Q. Would you identify, if you can, this exhibit, please?

A. Yes. This is a letter from Mack Nealey dated August the 31, 1972, to me regarding Caraveo.

Q. Do you remember getting that memorandum?

A. I must have, because I referred it to Malone for

(99)

action.

Q. I'd like to mark this as Plaintiff's Exhibit 16. Reading from this, the memorandum is dated, from Mr. Nealey, August 31, 1972. That's while he was still Project Director and prior to the time that Ms. Burdine took over as Project Coordinator; is that right?

A. Correct.

Q. And he, himself, mentions five or ten different specific complaints against Mr. Caraveo, including that he sends controversial letters to agencies with blunt and investigative overtone; shows interest in hiring only staff members of the Mexican-American descent, spends a lot of time out of the office, reluctance to use a sign-out book, ignores suggestions to curb long-distance telephone calls, openly criticizes the Project Director, keeps himself isolated from the office, types much of his own correspondence instead of

using the clerk typist; and other examples. Now, your memo on top of that is dated October 1, 1972, to Mr. Malone in which you say, "Maybe the time has come when I need to take action on administrative details. Is it too late to take action on this memo from Nealey?" Did you take any action as a result—

(100)

A. I referred it to Malone for action.

Q. Okay. So, Mr. Malone was the proper person to deal with that in your—

A. In my opinion.

Q. Did he, in fact, deal with it?

A. I could not respond on that.

Q. Now, I believe, reading from earlier Plaintiff's Exhibit 2-F, which was dated December 13, 1972, which is the time that Ms. Burdine, when she was Project Coordinator, she points out specifically problems concerning Mr. Caraveo; is that correct?

A. (No response.)

Q. And that's directed to Mr. Malone.

A. Well, yes. She mentions two people.

Q. And do you know whether Mr. Malone took any action at all?

A. I couldn't answer in the affirmative.

Q. So, at least Ms. Burdine made Mr. Malone aware of the situation concerning Mr. Caraveo—

A. Correct.

Q. —and another employee. And any action would have been up to him to take; is that correct?

A. That is my interpretation.

Q. And not having been made Project Director, she, herself, didn't have the authority to take any

(101)

personnel action against Mr. Caraveo, did she?

A. No.

* * *

(105)

. . . Texas Department of Community Affairs.

A. Not necessarily.

Q. I believe the policy is that promotions of the—

THE COURT: Let's don't dwell on that. That absolutely accomplishes nothing. Issue in this case is the qualifications of this Plaintiff and what the facts were with reference to it on what happened.

MR. GILL: Okay.

Q. Did you receive the memorandum from the Plaintiff, the one dated February the 9th of 1973, to Mr. Malone, asking for a listing in job descriptions; did Mr. Malone ever refer that to you or did you ever see that?

A. I probably saw it but, you know, I don't—

Q. Do you know whether a listing was ever provided to her as requested; a listing of job vacancies?

A. No. I couldn't answer that.

Q. Okay. And this memorandum to you of March 20, 1973, did you ever respond to that that you can recall; that is, the one in which she would ask for any assistance you could give in locating employment if the project was not funded?

A. I interpreted this to mean one thing. According—And may I read from it?

Q. Yes.

* * *

(107)

. . . knowledge?

A. I couldn't answer that, sir. Generally, I've depended on modifications to the contracts, any contract modifications of the PSC project, to be the ultimate responsibility of Mr. Malone as long as he was acting in a capacity of supervision either as the Director, or Acting Director, over the PSC project. All modifications to contracts generally came through him for approval and submission to me.

Q. You knew that Ms. Burdine was in a supervisory capacity over Mr. Walz during this period, did you not?

A. Yes.

Q. Okay. You knew that she had more seniority in the

PSC program than he had?

A. Yes.

Q. And you knew that she had more job experience in this kind of a program than he had, did you not?

A. Well—

Q. Did you know that, too, that she had worked in that program and those kind—

A. She had worked in the program longer, she had seniority, but I do not consider this to be a criteria that is binding. Seniority was not binding, in my opinion, . . .

* * *

(109)

A. Not to my recollection.

Q. Was the job advertised for bid?

A. No.

Q. What person did you solicit names from to make the selections? You said you solicited names.

A. I consulted with my staff—top staff people.

Q. Specifically who, do you remember?

A. One would have been Malone, one would have been Captain Taylor, who was with OEO, and others that I can't recall at the time; but people who would have had long experience in this type of operation and I felt could contribute to the mandate from which we were operating.

Q. Did you personally interview Ms. Burdine for that job?

A. No, I don't know whether I did or not. I don't recall that I did.

Q. I just have a couple of more questions.

A. May I inject something here?

Q. Yes, go ahead.

A. I discussed on many occasions—talked on many occasions with Ms. Burdine, and certainly looked over her qualifications very carefully when she was considered for other employment.

Q. Okay. I believe on page 20 of the deposition, when

. . .

* * *

(116)

. . . been earlier than that, sir.

Q. All right. We've already, I think, established and identified these exhibits—Defendant's Exhibits A, B and C, which are in reference to the termination of the PSC project by DOL, a letter to Mr. Fuller, and that's Exhibit A, is from Coffman to Fuller—a letter stating that the project would be eliminated. Exhibit B is dated February 22nd of '73, from Mr. Fuller to Mr. Coffman, where he urges the continuation of the program. Defendant's Exhibit C, March 20th of '73 letter, from Mr. Johnson to Mr. Fuller, concerning the conditions under which the Department of Labor would possibly continue the program. So, we'll enter these exhibits at this time.

MR. GILL: No objection.

(Whereupon, Defendant's Exhibits A, B (and C were received in evidence.

Q. (By Mr. Allen) I'm not sure whether we have identified this one. This is Defendant's Exhibit D, Mr. Fuller. It's a letter—a copy of a letter from you to Mr. Charles Johnson. Would you identify that, please, sir.

A. This is a letter from me to Mr. Charles Johnson dated March the 26th of 1973: "Dear Mr. Johnson, . . .

* * *

* * * (121)

. . . of Mr. Walz. Ms. Giles has been an employee of PSC since its inception and is well qualified for the position. Her resumé is enclosed." Paragraph.

"There will be one (1) vacancy on the staff on May 1st of 1973, that of a Secretary II to replace Ms. Giles. This position will be filled as soon as the job can be advertised and interviews completed, hopefully not later than the first week in May. If additional information is needed please let me know.

Sincerely,
Robert M. Watts
Project Coordinator
Public Service Careers"

Q. That was Mr. Watts' report to DOL on changes or reorganization of personnel; is that correct, sir?

A. That is correct, sir.

MR. ALLEN: We will introduce this as Defendant's Exhibit F.

(Whereupon, Defendant's Exhibit F (was received into evidence.

Q. Mr. Fuller, I've handed you what we have designated as Defendant's Exhibit G, a letter from Mr. Johnson to Mr. Watts, dated May 15, 1973. Would you identify that, please, sir.

A. Defendant's Exhibit G is a letter to Mr. Robert M. Watts from Charles E. Johnson, reading as follows—

PLAINTIFF'S EXHIBIT II B

MEMORANDUM

TO: PSC Staff

FROM: Mack D. Nealy, Project Director

SUBJECT: Delegation of Authority and Responsibility

DATE: October 2, 1972

It has become increasingly time consuming for the normal flow of incoming and outgoing correspondence to reach its proper destination because of my attention to PSC business in the field. During my absence from the office, Joyce Burdine will receive my calls, mail, sign vouchers, represent me at PSC related meetings and tend to matters that will accelerate any response to PSC inquiries.

This authority is effective immediately upon receipt of this memorandum and will remain so until further notice. Also, this action supercedes any previous memorandum containing office delegation of responsibilities.

rsb

cc John Malone
Staff Services Officer

Jim Cates
Project Officer
Department of Labor

PLAINTIFF'S EXHIBIT II E

November 8, 1972

TO: PSC Staff

FROM: John R. Malone

SUBJECT: Delegation of Authority

Due to my time being much more occupied than had been anticipated in November, I have asked Joyce Burdine to coordinate all administrative matters in the PSC office while I am acting director. "Administrative matters" shall include all duties *but* approving travel, approving contracts and approving expenditures of funds. It may be necessary, due to being short a staff member, for her to realign some duty assignments so that adequate coverage will be available for all segments of the PSC operation.

All travel requests will be initiated by Mrs. Burdine prior to submission so that travel is coordinated within the office.

I shall do the following:

A. Approve Travel
B. Approve payments
C. Approve the obligation of any funds
D. Review contracts before they are forwarded to Mr. Fuller for execution
E. Make *all* contacts with Department of Labor in Dallas or Austin except those necessary to clarify reports

PLAINTIFF'S EXHIBIT II F

MEMORANDUM

TO: John R. Malone, Acting Project Director, Public Service Careers Project

FROM: Joyce Burdine, PSC Project Coordinator

SUBJECT: Activities Report on PSC Project as of November 8, 1972

DATE: December 13, 1972

1. Phase out Modification for PCO-602 has been completed and approved by Project Officer, Jim Cates.
   Staff responsible for Activity: Joyce Burdine
   Allen Walz

2. Proposals and budget preparation have been negotiated with 7 sub contracting agencies already in contract.
   Staff responsible for activity: Joyce Burdine
   Allen Walz

3. Contract negotiations have been completed with 1 new sub contracting agency, Texas Department of Corrections.
   Staff responsible for Activity: Joyce Burdine
   Allen Walz

4. Contract Modification for PCO-622 for 15 month extension and request for additional funds has been completed and will be reviewed by Jim Cates, Project Officer.
   Staff responsible for Activity: Joyce Burdine
   Allen Walz

5. PSC Project Report for Governor Smith's term in office has been completed and submitted.
   Staff responsible for Activity: Allen Walz

6. Annual PSC Project for Texas Department of Community Affairs has been completed & submitted.
   Staff responsible for Activity: Allen Walz

7. MA5-19 Monthly report has been completed & submitted to Regional Department of Labor Office.
   Staff responsible for Activity: Allen Walz

Weekly staff meetings have been held in an attempt to coordinate the activities of the PSC staff. The first staff meeting was held November 10, 1972, approximately 2 days following my appointment as Project Coordinator and was in session for 3½ hours.

It was specifically agreed by all staff members that the state PSC office was neither as productive nor as effective as it could be. It was also specifically agreed by all staff members that state personnel rules & regulations have not been followed. I made the following recommendations in an effort to correct this:

1. If it is necessary for employee to be out of the office for more than one hour, fill out a leave request using annual or sick leave.
2. All out of state telephone calls will be approved by Project Coordinator or Project Director.
3. All out going correspondence pertaining to PSC contract compliance or policy will be coordinated or approved by Project Coordinator and an information copy of same addressed to Project Coordinator prior to transmission.
4. Submit Weekly Activity reports from All PSC professional staff in order to coordinate our efforts & effectively evaluate activities in relation to program goals.

There were many objections to all of the above recommendations by the training staff, Marion Kirkland, Training Specialist, and Roberto Caraveo, Training Coordinator based on the premise that they are "professionals" and should not be subjected to such. Also, Mr. Caraveo stated at the time that he was "shocked" that I had been designated coordinator and I shouldn't "come on so heavy." Ms. Kirkland stated that she felt that it is "incongruous and

completely out of line" and asked, "how in the world were you selected?" I referred her to John Malone, Acting Project Director, who actively participated in designating me as Coordinator (see memo dated 11-8-72).

At the present time the activities of the state PSC staff members are not being coordinated, the office is not as productive as it should be and state personnel rules & regulations are still not being followed by Ms. Kirkland or Mr. Caraveo. I have received no documentation of training activities or other PSC related activities by either staff member after my original request stated in my first staff meeting as well as subsequent requests.

Mr. Caraveo was given a monitoring assignment at Prairie View A&M College and was out of the office for approximately 3 days last week for the purpose of accomplishing his assignment. I have on two occasions requested a written report on his monitoring activities. To date I have not received it.

Ms. Kirkland was also given a monitoring assignment. I was told that she later called the Project Director & refused the assignment as she was not hired to interview people, (See Attached job description for Training Specialist which is included in the contract PCO-622, reference last sentence). Then she was out of the office for 3½ days last week. Her reason was that her father had been in an automobile accident. Monday & Tuesday of this week she did not report for work due to bad weather. Thursday morning of this week she did not report to work. Her reason was that she had fallen and skinned her knee. She has not to date submitted a leave request for any of the time she was out of the office in the past two weeks. She attended a meeting on Revenue Sharing Wednesday morning although she was not given this assignment by Project Director or Coordinator. Her attitude is both hostile and uncooperative in all matters. Constantly, I find myself dealing with Ms. Kirkland and Mr. Caraveo on a personal level instead of a professional level. There have been numerous interrup-

tions of this nature in the past five weeks which has been a critical time in this office because of the two contract modifications that have been in progress. Also, the morale of the other staff members is very low because of such instance. I have received queries from the professional field staff as to "*What* does the state PSC Training Staff do?" I don't have an answer and based upon my stated facts it is easy to see why. The workload in the office has not been evenly distributed in the past five weeks and even though many accomplishments have been made under very trying circumstances it would have been extremely helpful to have had the cooperation and assistance from the training staff.

I feel that it is necessary to call this urgent matter to your attention for action in order to prevent further damage to the program.

JB:dg

PLAINTIFF'S EXHIBIT II S

B. R. Fuller, Executive Director

Joyce Burdine, PSC Project Coordinator

Employment Transfers for PSC Staff March 20, 1973

As Texas Dept. Community Affairs does not have a Personnel Office I am enclosing my resume and that of Allen J. Walz for your review and consideration.

According to John R. Malone, the Texas PSC Project will not be continued after March 31, 1973. I will appreciate any assistance you can give us in locating employment alternatives in TDCA.

Thank you for your consideration in the matter.

dg

Enclosure

PLAINTIFF'S EXHIBIT II T

March 20, 1973 Dallas, Texas 75202

Mr. B. P. Fuller, Executive Director
Public Service Careers Program
State of Texas
Executive Department
Austin, Texas 78711

Dear Mr. Fuller:

In accordance with your request to Mr. Coffman for reconsideration of our decision on your PSC contract, I have been asked, in my capacity of contracting officer, to reply for Mr. Coffman. As you are aware, we decided to review your performance under PSC contract PCO-622. As agreed our review was conducted on March 14–16, 1973. The review team was composed of Mr. W. R. Rowell, DARMA and Mr. Roberto Chapa, Project Officer. On their visit to Prairieview College, Texas Southern University and University of Houston they were accompanied by Mrs. Joyce Burdine of the PSC staff. While in Austin they worked with Mr. John Malone. As a result of that review we are extremely concerned over the following deficiencies that were identified:

1. Overstaffing
2. Lack of fiscal control
3. Lack of proper documentation of expenditures
4. Payments made on expired subcontracts
5. Subcontracts developed that are in violation of the General Provisions of your contract
6. Lack of a Project Director
7. Expenditure accruals not accurate
8. Enrollee certifications inadequate
9. MA 101's not complete
10. Eligibility of some enrollees questionable
11. Staff not familiar with disadvantaged criteria
12. Enrollees in program who shouldn't be in the program

13. Lack of communications in PSC staff
14. Lack of training of PSC staff
15. Questionable fiscal practices
16. Subcontractors' hiring of staff not identified on their subcontract
17. Excess funds in the program although reports indicate there are none

The above items are only a few of the deficiencies noted in our review. In that regard, these items and others were discussed with the members of your staff who participated in our review.

In light of the review team's findings, we have decided to extend your present contract until June 15, 1973, or until present funds are expended, whichever comes first, under the following conditions:

1. A Project Director with complete authority to administer the program, including fiscal, must be appointed NLT April 3, 1973.
2. A competent and qualified fiscal officer must be appointed NLT April 3, 1973.
3. There must be a complete reorganization of the PSC staff, including those in subcontracts NLT April 3, 1973. Such reorganization must meet with my approval.
4. A modification extending the contract as specified above must be signed NLT March 31, 1973.
5. Staff training is to be conducted by regional office staff on April 4–5, 1973.
6. Fiscal control must be instituted immediately under the direction of the Project Director.
7. Subcontracts are to be modified or new contracts developed as needed.

We will review your progress in correcting the identified deficiencies and make a decision on further extension of your contract NLT June 1, 1973. Your Project Officer has a complete list of all deficiencies noted and will work with you in instituting the ncessary corrective action.

Please advise me if there is any question regarding the above.

CHARLES E. JOHNSON
Contracting Officer

PLAINTIFF'S EXHIBIT XII

DEPARTMENT OF COMMUNITY AFFAIRS
Personnel Action Form

☐ New Hire

☒ Classification Change

☐ Termination

☐ Other _____

Effective Date May 1, 1972

Social Security # 452-48-5076

FROM

NAME	John Robert Malone
TITLE,	Staff Services Officer II
CLASS, STEP	Group 20, Step 2
SALARY	$1,259.00/mo.
PAYROLL NO.	

TO

NAME	John Robert Malone
TITLE,	Chief of Staff Services
CLASS, STEP	Group 21, Step 2, 1554
SALARY	$1,345.00/mo.
PAYROLL NO.	

JUSTIFICATION Increased responsibilities and work load.

RECOMMENDED _____ April 26, 1972
Supervisor — Date

APPROVED _____ _____
Director — Date

APPROVED /s/ _____ April 26, 1972
Executive Director — Date

SUBMIT IN DUPLICATE. This form must be received in Central Accounting by the *10th* of the month in which the action is effective.

PLAINTIFF'S EXHIBIT XIV

Resumé

Joyce Burdine

ADDRESS:	1101 B Arthur Stiles Rd., Austin, Texas 78721
TELEPHONE:	(512) 385-4213
DATE OF BIRTH:	May 30, 1936
PLACE OF BIRTH:	Hamilton, Texas
SEX:	Female
MARITAL STATUS:	Divorced
NUMBER OF CHILDREN:	2
EDUCATION:	High School, one year College at Texas Tech., Lubbock, Texas

SPECIALIZED TRAINING:
Certified Workshops and Inservice Training in the following areas: Task Analysis and Job Restructuring, Job Element Examining System, and Basic Management Techniques II, conducted by the United States Civil Service Commission. Completed Director Training Course for Pre School Centers, Four Seasons Nursing Centers, Oklahoma City, Oklahoma.

EMPLOYMENT EXPERIENCE

JOB DESIGN COORDINATOR July, 1972 to present
PROJECT COORDINATOR (as of November 8, 1972)
Texas Department of Community Affairs
Public Service Careers
P.O. Box 13166–Capitol Station
Austin, Texas 78711
B. R. Fuller, Executive Director (512) 475-2431

Duties: Responsible for coordinating all activities directly related to contractural agreements to employ, upgrade and train minorities certified as disadvantaged, educationally, vocationally and economically. Other duties are program and proposal development, program monitoring, designing appropriate job descriptions, task analysis and job restructuring and any related human resource

management services designed to remove barriers precluding potential workers with undeveloped skills. Responsible for supervising and coordinating program efforts with a staff of sixteen employees. Annual Salary: $11,232

DATA ANALYST — January, 1972–July, 1972
(with same project as above)

Duties: Responsible for program and contract development, proposal writing, monthly reports to Regional D.O.L. office, maintaining current enrollee records and reports for 413 enrollees in the Central Records Unit, providing technical assistance in records and reporting system for field staff. Annual Salary: $6,204

ACCOUNTING CLERK II — September, 1970–January, 1972

State Health Department
1100 West 49th Street
Austin, Texas 78756

Duties: Verify local expenditure reports. Post summarize & balance savings to Working Reserve Book, prepare work sheets for monthly reports, distribute operating budget, allocation, spread sheets, reports and budget revisions. Annual Salary: $5,088
Al Joe Hunt, Section Chief (512) 454-3781

DIRECTOR, FOUR SEASONS — April, 1970–July, 1970
Child Center (company filed bankruptcy)
Austin, Texas

Duties: Manage & Operate 200 capacity pre-school Child Center, supervise teaching and service staff of 20, develop in service training for staff, purchase materials, supplies & foodstuffs pertinent to operation of center, manage and be accountable for safety and well being of all the children enrolled in the center. Annual Salary: $7,200, plus travel allowance. Warren Osburn, Director (405) 321-6942

JOB DEVELOPER July, 1968–December, 1969
New Careers Program
Austin, Texas

Duties: Develop contracts and training positions, monitor for contract compliance, perform job analysis and restructuring, collect, analyze and develop occupational data, coordinate public relations campaign. Annual Salary: $7,920, plus travel allowance. Edward Hill, Director (512) 477-6561 Ext. 235

REFERENCES:

1. Harvey King
   Education Consultant
   Texas Education Agency
   201 E. 11th Street
   Austin, Texas 78702
2. Edward Hill
   President
   Metropolitan Mgmt. Company
   P.O. Box 40
   Austin, Texas 78717
3. Charles Graham
   Asst. Chief of Special Programs Office of Education, Information and Training
   Texas Dept. of Community Affairs
   P.O. Box 13166, Capitol Station
   Austin, Texas 78711

GOVERNMENT EXHIBIT XVI

MEMO
FROM
B. R. Fuller
Governor's Office
475-2837

10/1/72

Malone

maybe the time has come when I need to take action on administrative details.

is it too late to take action on this memo from Nealy?

BRF

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS
MEMORANDUM

TO: B. R. Fuller, Executive Director
FROM: M. D. Nealy, PSC Project Director
DATE: August 31, 1972
SUBJECT: Roberto Caraveo

Mr. Caraveo entered into employment with Public Service Careers on February 7, 1972, as Training Coordinator. There is presently existing grave concern surrounding his performance within this capacity which is felt to be not in the best interest of our present and long range goals. Most are considered to be personal which adversely affects his performance and the general image of Public Service Careers.

Mr. Caraveo finds it extremely difficult to communicate his PSC activities with me and there are constant instances of subtle, blatant insubordination, and lack of conformity. Listed below are examples:

1. Reluctance to using sign-out book showing agencies contacted and nature of business. Openly verbalizes his opposition.
2. Ignored suggestion to curb long distance telephone calls in areas without PSC enrollees and out-of-state calls. Many calls were made to his hometown of McAllen.
3. Spends most of his time out of the office supposedly at the Blind Commission visiting Luis Larralde, PSC Human Resource Management Specialist.
4. Mr. Caraveo shows only an interest in hiring staff and enrollees of Mexican-American descent.
5. Sent controversial letters to agencies with blunt and investigative overtones.
6. Openly criticized me and others for hiring decisions made within the Department of Community Affairs.
7. Keeps office door closed to isolate himself from office staff.

8. Discusses internal PSC affairs with persons not connected with this office. Discussion is directed forward (sic) administrative decisions, PSC staff meetings, and correspondence received from within and from outside sources.
9. Types much of his own correspondence. We have one (1) secretary and one (1) clerk typist.
10. Conversation is practically nil when meeting and negotiating with agencies. Some of this may be due to speech impediment.

These are examples of problems which I feel should receive immediate attention. I have attempted to address Mr. Caraveo to these problems but unfortunately, to no avail. He is nearing his six (6) months of employment which will end his probationary period and I feel that serious consideration should be given to Mr. Caraveo's future employment with Public Service Careers. However, I hesitate to suggest remedies until I have had an opportunity to further discuss this matter with you and John Malone.

DEFENDANT'S EXHIBIT A

U.S. DEPARTMENT OF LABOR
MANPOWER ADMINISTRATION
Federal Building—U.S. Courthouse
1100 Commerce Street—7th Floor

February 9, 1973 Dallas, Texas 75202

Mr. B. R. Fuller
Executive Director
Texas Department of Community Affairs
P.O. Box 13166, Capitol Station
Austin, Texas 78711

Dear Mr. Fuller:

As you know, the President's budget message called for a reduced federal spending level. In order to be consistent with the President's economy program at the federal level, the Manpower Administration has examined expenditures to ensure that Manpower programs are operating in the most economical and efficient fashion.

Since the fund allotment for Manpower training in Texas for this fiscal year was reduced, we were instructed to phase out and eliminate those projects with a low participation rate.

An analysis of your project as of December 31, 1972, indicates that the participation rate in the entry component was 18% and 5% in the upgrade component.

In view of the above, the Texas Public Service Careers project was selected as one of the Manpower training projects to be phased out.

This will inform you that the Texas PSC will terminate March 31, 1973. Hopefully, this will give the staff time to close out the project and obtain other employment.

We regret that we must take this action. Please let us know if you have any questions concerning the matter.

Sincerely,

R. L. COFFMAN
Regional Manpower Administrator

DEFENDANT'S EXHIBIT C

U.S. DEPARTMENT OF LABOR
MANPOWER ADMINISTRATION
Federal Building—U. S. Courthouse
1100 Commerce Street—7th Floor

March 20, 1973 Dallas, Texas 75202

Mr. B. P. Fuller, Executive Director
Public Service Careers Program
State of Texas
Executive Department
Austin, Texas 78711

Dear Mr. Fuller:

In accordance with your request to Mr. Coffman for reconsideration of our decision on your PSC contract, I have been asked, in my capacity of contracting officer, to reply for Mr. Coffman. As you are aware, we decided to review your performance under PSC contract PCO-622. As agreed our review was conducted on March 14–16, 1973. The review team was composed of Mr. W. R. Rowell, DARMA and Mr. Roberto Chapa, Project Officer. On their visit to Prairieview College, Texas Southern University and University of Houston they were accompanied by Mrs. Joyce Burdine of the PSC staff. While in Austin they worked with Mr. John Malone. As a result of that review we are extremely concerned over the following deficiencies that were identified:

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5. Subcontracts developed that are in violation of the General Provisions of your contract
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7. Expenditure accruals not accurate
8. Enrollee certifications inadequate

9. MA 101's not complete
10. Eligibility of some enrollees questionable
11. Staff not familiar with disadvantaged criteria
12. Enrollees in program who shouldn't be in the program
13. Lack of communications in PSC staff
14. Lack of training of PSC staff
15. Questionable fiscal practices
16. Subcontractors' hiring of staff not identified on their subcontract
17. Excess funds in the program although reports indicate there are none

The above items are only a few of the deficiencies noted in our review. In that regard, these items and others were discussed with the members of your staff who participated in our review.

In light of the review team's findings, we have decided to extend your present contract until June 15, 1973, or until present funds are expended, whichever comes first, under the following conditions:

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5. Staff training is to be conducted by regional office staff on April 4–5, 1973.
6. Fiscal control must be instituted immediately under the direction of the Project Director.
7. Subcontracts are to be modified or new contracts developed as needed.

We will review your progress in correcting the identified deficiencies and make a decision on further extension of your contract NLT June 1, 1973. Your Project Officer has a complete list of all deficiencies noted and will work with you in instituting the necessary corrective action.

Please advise me if there is any question regarding the above.

CHARLES E. JOHNSON
Contracting Officer

DEFENDANT'S EXHIBIT F

April 26, 1973

Mr. Charles E. Johnson, Contracting Officer
Manpower Administration
Federal Building—7th Floor
1100 Commerce Street
Dallas, Texas 75202

Dear Mr. Johnson:

The following personnel actions were completed as of April 1, 1973 and in which we ask your concurrence.

1. Allen Walz was promoted from Data Assistant to Project Coordinator for the University of Houston and the proposed subcontract with the State Department of Corrections. (Resume enclosed.)

2. Frank Estringel, Project Coordinator on the staff of the State Commission for the Blind, was transferred from the State Commission for the Blind to the Texas Department of Community Affairs (PSC) and will continue as the Project Coordinator for t! ıt subcontractor, but will be on the payroll of and housed in the central office of Public Service Careers. (Resume enclosed.)

3. Sallye Akin, Project Coordinator on the staff of the State Department of Public Welfare (DPW) was transferred from DPW to the Texas Department of Community Affairs (PSC) and will continue as the project coordinator for that subcontractor, but will be on the payroll of and housed in the central office of PSC. (Resume enclosed.)

4. Mrs. Gladys A. Maymi, Secretary to the Coordinator for the State Commission for the Blind was transferred to the Texas Department of Community Affairs (PSC). (Resume enclosed.)

5. Robert M. Watts, transferred from the Texas Office of Economic Opportunity, a Division of the Texas Depart-

ment of Community Affairs to the position of Project Director, Public Service Careers. Approval previously received from D.O.L.

The following personnel action was completed on April 23. Mr. Homer Hix, formerly with the CEP program in Waco, was hired as Fiscal Officer for PSC. (Resume enclosed.)

The following personnel action will be completed on May 1. Deloris Giles, a Secretary II, will be promoted to the Data Assistant position to fill the vacancy created by the promotion of Mr. Walz. Miss Giles has been an employee of PSC since its inception and is well qualified for the position. Her resume is enclosed.

There will be one (1) vacancy on the staff on May 1, 1973, that of a Secretary II to replace Miss Giles. This position will be filled as soon as the job can be advertised and interviews completed hopefully not later than the first week in May.

If additional information is needed, please let me know.

Sincerely,

Robert M. Watts
Project Director
Public Service Careers

RMW:gam
Enclosures–a/s
cc: Mr. Robert Chapa, Project Officer

RESUME

Name: Allen Joseph Walz

Address: 1920 Eastside
Austin, Texas

Date of Birth: July 29, 1949

Place of Birth: Melrose, Minnesota

Sex: Male

Marital Status: Married (no dependents)

Phone: Home—444-0689

Education:
St. Mary's Elementary
Grades 1–8
Melrose, Minnesota

Melrose High School
Graduate—1967, Extra curricular activities: School's plays, Distributive Education Clubs of America, Basketball, Football, Track, Letterman's Club.

Metropolitan State Junior College, Minneapolis, Minnesota. Date attended: 68–70. Graduate—1970 Associate Arts Degree.

Extra Curricular Activities: Distributive Education Clubs of America, Cooperative Education Program, Alternative Education Program, Basketball. Major subjects: Social Science, Business.

University of Minnesota, Minneapolis, Minnesota. Dates attended: 1971—1 plus years. Extra curricular activities: Internship Programs, Alternative Education Program, Basketball. Major subjects: Business, Social Science.

Employment Experience

Project Coordinator—April 1973—Texas Department of Community Affairs (Public Service Careers)—P.O. Box 13166—Capitol Station
Austin, Texas 78711
Robert M. Watts, Project Director (512) 475-4645
John Malone, Staff Services Officer (512) 475-4645

Duties: Responsible for coordination of all (human resources management, employment and training, counsel record keeping and reporting) PSC activities within at least one delegate agency. Responsible for training personnel within delegate agencies in proper procedures needed to obtain PSC services. Assisted in recruitment activities in delegate agencies. Responsible for proposal writing and contract development in new agencies.

Annual salary: $968.00 per month.

Data Analyst—July 1972–March 1973—promoted Texas Department of Community Affairs (Public Service Careers) —P.O. Box 13166—Capitol Station, Austin, Texas 78711.

Joyce Burdine—PSC, Project Coordinator (512) 476-5391 John M. Malone, Project Director/Staff Services Officer, (512) 475-5928.

Duties: Collect and compute data submitted by subcontracting agencies to determine enrollee's needs in the areas of training (academic or skilled), job coaching and supportive services. Complete monthly reports for Regional Manpower Office and the Department of Labor. Make regular on-site monitoring visit to the subcontracting agencies to provide technical assistance as needed. Assist project coordinator in proposal writing and contract development.

Salary: $590.00 per month.

Research Consultant—Oct. 1, 1971–Jan. 1, 1972 Minneapolis Urban Corps.

Duties: Collect, compute and analyze data on Alternative Education and unstructured educational programs throughout the United States. Data collected was used as input to the federally funded education project, Southeast alternatives.

Anita Suess—Education Supervisor—Minneapolis Urban Corps., 1603 Chicago Ave. So., Minneapolis, Minnesota.

Daniel Rooney—Teacher—325515 Ave. So., Minneapolis, Minnesota.

Data Records Specialist Assistant—Concentrated Employment Program, Model Cities—June 1971–October 1971.

Duties: Helped plan and initiate Central Records Unit in order to follow each enrollee as they progressed through the program. Aided the Information System Specialist in collecting and computing data for monthly federal forms. Assisted Resident Planner investigate specific problems area residents were having and explaining new avenues the Model Cities Project could provide them. Attended most of the Model Cities meetings to keep abreast of current problems.

Salary: $2.50 per hour.

Teaching Assistant—Bryant Jr. High School—Jan. 1971–June 1971, Minneapolis, Minnesota.

Assisted cooperative education teacher in an unstructured learning environment. Worked with students on an individual basis helping them design a curriculum which best suited their needs. Arranged meetings with city officials, manufacturing plants and any other organization that might interest a student as part of his learning environment. Investigated resources that would help students develop a meaningful and realistic learning experience. Conducted daily student group sessions to discuss new ideas or problems that were confronting them.

Salary: $2.50 per hour.

Joe Nathan—Teacher—St. Paul Open School, Minneapolis, Minnesota.

Kenneth Gilcrest—Teacher—Metropolitan State Junior College—50 Willow St., Minneapolis, Minnesota.

Assistant Manager and Part Owner—Necollet Shell Station, Minneapolis, Minnesota—Oct. 1969–Nov. 1970.

Duties: Train and familiarize station employees with the functions and operations of the station in the areas of retail management, merchandising, salesmanship and customer service. Responsible for daily transactions of the station and weekly reporting activities to Shell Oil Company.

Salary: $3.00 per hour—plus profits.

Fred Boyer—Manager—Nicollet Shell Station—4517 36½ Street, Minneapolis, Minnesota.

John Conelly—Dealer—Management Instructor—Shell Oil Company—6700 So. Cedar, Minneapolis, Minnesota.

Specialized Training: Shell Oil Company—Dealer Management Training Program, Minneapolis, Minnesota. Dates attended: August 1970–Sept. 1970. Major subjects: Sales, Salesmanship, Retail Management, Merchandising and Customer Service.

Community Organization Program: Completed a three (3) week Community Organizational Leadership Program designed by Saul O'Linski. Dates attended: August 1971

Public Service Careers Regional Workshop—Major subjects: Job restructuring, Job Analysis. Dates attended: Jan. 4, 1972

Seminars: Attended seminars on Revenue Sharing and a three (3) day workshop with the Equal Employment Opportunities Commission dealing with equal employment in state agencies.

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

NO. 79–1764

* * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

HUBERT L. GILL
P. O. Box 777
Austin, Texas 78767
(512) 474-1636

ATTORNEY FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

NO. 79–1764

* * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

Respondent, JOYCE ANN BURDINE, respectfully prays that a writ of certiorari be denied to the review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 17, 1979, with rehearing denied on March 10, 1980.

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that when the Defendant in a Title VII case is required to articulate a legitimate, nondiscriminatory reason for an employment decision that it must prove the reason by legally sufficient proof rather than merely stating fictitions or unsupported reasons for its actions.

2. Whether the Court of Appeals may make an independent review of a finding on nondiscrimination by the Trial Court or whether it must follow the clearly erroneous standard.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's rendition of the facts but would add and clarify as follows:

Respondent had several years of experience in manpower programs while both males, WALZ and WATTS, had very little previous experience.

Respondent was not given a promotion or increase in pay from the period between November 1972 and April 1973 although she was given additional responsibilities and duties.

Respondent clearly expressed her desire, both orally and in writing, to remain in the program after the reorganization.

The Department of Labor made no requirements as to who the new personnel in the program should be.

Respondent was never interviewed for the Project Director position, or for any other position to be created after the reorganization; the male, WATTS, was transferred from another division contrary to a written personnel policy that stated a preference toward promotion of division employees over transfers from another division; the positions were not placed for bids as required by personnel policy; and the agency director personally recruited the male WATTS for the job of Project Director.

There was only one female Project Director out of eleven (.09%) even though the agency itself was comprised of forty-four (44%) percent females.

Although the agency director, FULLER, testified that he believed that Respondent was responsible for inadequacies in the program and dissension among staff members, absolutely no evidence was introduced to support this assertion.

Respondent filed suit alleging sex discrimination (1) in her termination and non-promotion in favor of WATTS; (2) in her termination and the retention of WALZ; and, (3) in unequal pay for performing the Project Director duties from November 1972 to April 1973 at no increase in pay. Plaintiff also requested reasonable attorney's fees. The United States District Court for the Western District of Texas, Austin Division, denied relief on all counts. The Court of Appeals for the Fifth Circuit affirmed the lower Court's ruling regarding WATTS, reversed regarding WALZ, remanded for further findings regarding the unequal pay claim and remanded for reasonable attorney's fees. From that decision and the denial of a petition for rehearing, the Petitioner seeks a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

The trial court made no express finding as to whether a prima facie case of discrimination was shown under the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, the Court of Appeals found that a prima facie case was proven and Petitioner has not challenged this finding. Petitioner also admits that, under the Green test, once a prima facie case is shown, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. However, Petitioner takes issue with the standard of proof necessary by the employer in articulating this legitimate, nondiscriminatory reason as set forth by the Court of Appeals. The Fifth Circuit Court of Appeals has clearly held prior to the instant case that the employer must prove a legitimate, nondiscriminatory reason by a preponderance of the evidence, and that "articulate" means to prove by legally sufficient evidence. Turner v. Texas Instruments, 555 F.2d 1251, 1255 (5th Cir. 1977). If the employee meets this burden, the burden then shifts back to the Plaintiff to show that such reason(s) was merely pretextual. Petitioner asserts that this standard as set forth here and in Turner is in conflict with this Court's rulings in Furnco Construction Company v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Petitioner contends that it is only necessary for the employer to state a reason for its conduct, regardless of whether there is any evidence to support it.

Here, the Court of Appeals spoke directly to this alleged conflict and rejected it. The Court of Appeals stated that Sweeney merely held that an employer is not required to prove the absence of a discriminatory motive; however, this does not mean that no evidence other than the bald assertion of a reason by the employer is sufficient to rebut the prima facie case. The Court of Appeals stated in Turner that:

> "To rule otherwise would unduly limit a Plaintiff's opportunity to respond to an employer's articulation of reasons. If an employer need only articulate—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions.... and the Plaintiff would find himself attempting to prove that a reason without factual foundation—presumed true—was a pretext for discrimination. We would not act consistently with our for discrimination.... We would not act consistently with our national policy in favor of eliminating racial discrimination in employment, if we did not allow the Plaintiff to challenge the factual validity of an employer's reasons offered to rebut a Plaintiff's prima facie case." Id at 1255-56.

This standard set forth by the Fifth Circuit has since been followed by the D.C. Circuit in Williams v. Bell, 587 F.2d 1240,1246 (D.C. Cir. 1978) and by the Tenth Circuit in Higgins v. Gates Rubber Company, 578 F.2d 281, 284 (10th Cir. 1978).

This Court's holdings in Furnco and Sweeney make the same distinction as the Court of Appeals did between "articulating (or proving) some legitimate, nondiscriminatory reason" for the conduct of the employer and in proving absence of a discriminatory motive. In Furnco, Id, S.Ct.R at 2950, this Court stated that "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." In Sweeney, the Court of Appeals stated that "in requiring the Defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." On review, this Court made the distinction, as did the Court of Appeals here, between articulating some legitimate, nondiscriminatory reason and proving absence of discriminatory motive. As the Court of Appeals held here, this distinction is not relevant in this case since the employer was not required to prove absence of discriminatory motive but merely to articulate a legitimate, nondiscriminatory reason for its conduct by legally sufficient proof.

In applying the standard here, the Court of Appeals found that regarding the transfer of the male, WATTS, the employer had articulated a legitimate, nondiscriminatory reason in that WATTS was better qualified for the job than Petitioner and that Petitioner had failed to show that this reason was pretextual. However, regarding the retention of WALZ and termination of Respondent, the Court held that the employer had simply made bald assertions that were unsupported by evidence and contrary to the other evidence to the effect that he considered the male qualified and that he followed the recommendations of others. No comparative factual data of qualifications and performance was introduced and no objective criteria for the jobs were stated. In fact, the other evidence clearly rebutted the employer's testimony. The Petitioner in its petition here has alleged that Respondent was a "troublemaker" and "incompetent." No prior allegation anywhere in this case has previously been made that Respondent was incompetent. Concerning the "troublemaker" label, as the Court of Appeals stated, no evidence was ever introduced to support this charge and, in fact, the problems in the agency of a recalcitrant staff predated Respondent's job, as evidenced by a letter from her former supervisor to the director and from Respondent to her supervisor (at 1782, Ftnote 10).

Therefore, proof of nonreliance on a discriminatory motive was not required in this case. The Petitioner was never able to articulate a legitimate, nondiscriminatory reason for its termination of Respondent and retention of WALZ. Further, the assertion by Petitioner that to require the employer to prove reliance on a legitimate, nondiscriminatory reason is the same as requiring proof of absence of a discriminatory motive is simply incorrect. For example, reliance on a legitimate, nondiscriminatory reason, such as comparative qualifications or treatment, might be shown by the employer. The burden would then shift to the Plaintiff to show that this reason was merely a pretext and that another illegitimate reason was the basis for the employer's conduct. Thus, the burden would be on the Plaintiff, as it should be, to prove discrimination by a preponderance of the evidence. The employer's proof of reliance on qualifications would be, in effect, an affirmative defense that would have to be rebutted

by the Plaintiff. The employer would not be required to prove absence of a discriminatory motive. Here, the Court of Appeals merely held that the employer had not articulated a legitimate, nondiscriminatory reason for its actions. To hold otherwise, as the Court of Appeals noted in Turner, would place the Defendant in the ludicrous position of having to prove that legitimate but fictitious reasons unsupported by the evidence were not the real reasons for the employer's conduct. Respondent respectfully submits that such a requirement is not contemplated by Title VII or this Court.

II.

Even if the Court of Appeals committed error in this case, which Respondent argues it did not, the Petition for Writ of Certiorari should nontheless be denied in that the Court clearly held that Respondent proved her charge of discrimination by a preponderance of the evidence while Petitioner failed to rebut this proof. Therefore, the Court concluded, in effect, that Petitioner prevailed on the ultimate issue of discrimination by a preponderance of the evidence. Thus, the issue of the shifting burden of proof is immaterial to the ultimate factual and legal finding of discrimination. The error of law, if one exists, is harmless. Therefore, if this Court grants the Petition, it is, in effect, agreeing to decide an ultimate issue of fact. Respondent respectfully submits that this Court should not concern itself with issues of fact.

III.

Further, even if the Court finds that an error of law was committed by the Court of Appeals, it should not grant the Petition on the basis that the Court of Appeals correctly decided the case under the existing law at that time as set forth in Turner, Supra. Turner has since been followed in numerous cases. If there has been a change in the law overruling the doctrine of Turner, such change would have to be applied retroactively to require reversal here. Respondent submits that under the doctrine of Chevron Oil Company v. Huson, 404 U.S. 97 (1971), that any such change should not be applied retroactively so as to effectively deny Respondent of a legal remedy.

IV.

Petitioner asserts a conflict between circuits on whether a finding of discrimination should be reviewed under the clearly erroneous standard as urged by Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), cert. denied, _____U.S._____, 100 S.Ct. 733 (1980), or whether a finding of discrimination is both an ultimate finding of fact and law that can be reviewed independently of the clearly erroneous standard as stated in Causey v. Ford Motor Company, 516 F.2d 416 (5th Cir. 1975), and Stewart v. General Motors Corporation, 542 F.2d 445 (7th Cir. 1976), cert. denied 433 U.S. 919 (1977).

In Sweeney, that Court chose to follow the clearly erroneous standard. However, the Court clearly stated that "We shall look carefully,however, to detect infection from legal error, and of course the clearly erroneous standard does not shield findings that are unsupported or arbitrary." Id at 109. Therefore, Respondent submits that, even if a conflict does exist as to the proper rule to follow, that such conflict is not relevant here in that both circuits require findings that are supported by the evidence. Here, the Petitioner argues that the District Court found that the Respondent could not get along with her fellow employees and that, consequently, the program suffered and that this finding supported the ultimate finding of no discrimination. No other findings of fact are offered for review by the Petitioner.The Court of Appeals held that this finding was totally unsupported by the evidence and was, in fact, in conflict with the evidence (p. 1782). Respondent submits that even under the Sweeney standard that no error has been committed by the Court of Appeals.

Further, Respondent submits that the Court of Appeals followed the standard as previously set forth by the Fifth Circuit in Causey and East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975), a standard undisturbed by this Court to date. Even if a conflict does exist, Respondent submits that it is not applicable to this case and that it is not of such practical importance as to necessitate review by this Court. Also, see Huson, Supra.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HUBERT L. GILL
Attorney for Respondent

CERTIFICATE OF SERVICE

I, HUBERT L. GILL, Attorney for Respondent herein, do hereby certify that three (3) true and correct copies of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for Fifth Circuit have been served upon Attorneys for Petitioner by placing same in the United States mail, certified, return receipt requested, addressed to LONNY F. ZWIENER, Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 23rd day of May, 1980.

Hubert Gill
Hubert L. Gill

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

NO. 79 - 1764

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

BRIEF FOR THE PETITIONER

* * *

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant in a Title VII case must prove by a preponderance of the evidence that it relied on a nondiscriminatory reason in making a challenged employment decision or whether such defendant is merely required to articulate a nondiscriminatory reason for the decision which the plaintiff must prove to be pretextual.

2. Whether a finding of nondiscriminatory motive by a District Court should be upheld unless found to be clearly erroneous.

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SEPTEMBER TERM, 1980

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TEXAS DEPARTMENT OF
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JOYCE ANN BURDINE,

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* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 608 F.2d 563.

JURISDICTION

The opinion of the Court of Appeals was entered on December 17, 1979. A timely position for rehearing with a suggestion that the rehearing be en banc was denied on March 10, 1980.

The Petition for Certiorari was filed on May 6, 1980, and was granted on June 16, 1980.

This Court's jurisdiction is invoked under 26 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is 42 U.S.C. §2000e, et. seq.

STATEMENT OF THE CASE

Respondent, Joyce Ann Burdine (Burdine), was hired by Petitioner, Texas Department of Community Affairs (TDCA) in January, 1972, as an accounting clerk in the Public Services Careers Division (PSC) (R 3, 4). She was promoted in July, 1972, to Field Services Coordinator (R 5). In early October, 1972, Mark Nealy, the Project Director of PSC, assigned Burdine additional duties (R 5). Nealy resigned in mid-October, 1972, and additional duties were assigned to Burdine in November, 1972, by Nealy's former supervisor, John Malone (R 6). After Nealy resigned, Burdine performed a coordinating role for the PSC project under Malone (R 90). She had some supervisory responsibility (R 91).

The United States Department of Labor (DOL) totally funded PSC (R 73); in February, 1973, DOL gave written notice to B.R. Fuller (Fuller), the Executive Director of TDCA, that the PSC program would be terminated at the end of March, 1973, because of certain inadequacies (R 116, DX "A"). Fuller believed that part of the PSC program's problems with DOL could be attributed to Burdine in her coordinating and supervisory role (R 90, 91). These problems included: (1) lack of proper documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; and (5) unqualified enrollees being allowed into programs (R 77, DX "A"). Fuller was able to convince DOL to continue funding the PSC program subject to certain conditions (R 116, DX "C"). DOL ordered the appointment of a permanent Project Director and a reorganization and reduction of staff (R 116, DX "C").

Fuller was also convinced that Burdine was partially responsible for a problem with dissension among the PSC staff (R 77, 83, 90, 91, 95). The District Court found that Burdine, Marian Kirkland and Roberto Carraveo

had disagreements and did not work well together (A-3). In her supervisory role, Burdine was, in Fuller's estimation, ultimately responsible for resolving communication and dissension problems among the staff (R 91, 95). When the PSC program was reorganized, Fuller terminated Burdine, Kirkland and Carraveo (R 87).

Fuller appointed Robert Watts (Watts), an experienced administrator with excellent credentials (R 79, 80), to fill the position of Project Director. Robert Walz (Walz) was promoted to the position of Project Coordinator (R 81). Walz was the only professional level employee retained in the PSC program (R 121, DX "F"). There was no evidence that Walz had any responsibility for the dissension problems in the PSC program or for any of the problems pointed out by DOL.

Burdine filed suit in the United States District Court for the Western District of Texas, Austin Division, against TDCA, alleging that she had been discriminated against on the basis of sex in violation of 42 U.S.C. §2000e, et. seq. After a trial to the Court, the District Court ruled on December 8, 1976, that TDCA had not acted with discriminatory intent in terminating Burdine while hiring Watts and retaining and promoting Walz.

The United States Court of Appeals for the Fifth Circuit in its opinion of December 17, 1979, affirmed the District Court's ruling that there had been no discrimination in the decision to hire Watts, rather than Burdine, for the position of Project Director. However, the Court of Appeals reversed the District Court's finding of no discrimination insofar as it applied to the termination of Burdine and retention and promotion of Walz. The Court of Appeals ruled that TDCA had failed to prove by a preponderance of the evidence that it had relied on nondiscriminatory reasons in making the decision to retain and promote Walz while terminating Burdine.

TDCA then filed a petition for rehearing (with the suggestion that the rehearing be en banc) with the Court of Appeals; the petition was overruled on March 10, 1980, and review was then sought in this Court.

SUMMARY OF ARGUMENT

1. TDCA articulated several legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz; thereby rebutting Burdine's prima facie case. Burdine did not introduce evidence which would indicate that the reasons articulated were pretextual and, consequently, Burdine failed to satisfy her burden of proof.

2. The finding by the District Court that the decision to terminate Burdine while retaining and promoting Walz was not based on considerations of sex, was not clearly erroneous, and should be affirmed.

ARGUMENT

I.

This Court established the framework for considering a Title VII case in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, a plaintiff establishes a prima facie case by proving that he belongs to a class protected by Title VII, that he applied for and was qualified for a job for which the employer was seeking applicants, and that he was rejected and the employer continued to seek applicants among persons having the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the plaintiff establishes a prima facie case the burden shifts to the defendant to merely articulate or state a legitimate, nondiscriminatory reason for the challenged personnel decision. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978). The defendant's burden is not a burden to persuade the trier that he was in fact motivated by the articulated reason and not a

discriminatory one. Rather, it is merely a burden of production. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979).

When the defendant has articulated a legitimate reason for his personnel decision, it becomes the plaintiff's burden to show that the reason so articulated is merely pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To require the defendant, as the Court of Appeals has in this case, to prove its reliance on a legitimate reason by a preponderance of the evidence would make the third step of the *McDonnell Douglas'* test superfluous. *Board of Trustees v. Sweeney*, 439 U.S. 24, fn. 1 (1978). In *Sweeney* the Court of Appeals had required the defendant to prove absence of discriminatory motive; the Court of Appeals in this case has, in effect, imposed the same burden on TDCA, since the only way to prove absence of discriminatory motive is to show reliance on legitimate reasons.

> If a defendant were to *prove* that he was motivated by a legitimate reason, there would be no room left for showing that reason was a "pretext", as a pretext is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Webster's Third New International Dictionary (1971). To say, as the court did here that the defendant must prove that its action *was* based on a legitimate reason *and* that the plaintiff must "then" prove that it was not, is contradictory. *Loeb v. Textron, Inc.*,, 600 F.2d 1003, 1012 (1st Cir. 1979).

The *McDonnell Douglas* framework assures that the burden of proving discrimination remains at all times with the plaintiff. Because direct evidence of discriminatory intent is difficult to produce in court and

because an employer has the best access to the reasons for his decision, an inference sufficient to support a prima facie case will arise once the plaintiff has established that the challenged decision was not based on the two most common nondiscriminatory reasons, i.e. lack of qualifications or absence of a vacancy in the job sought. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 fn. 44 (1977).

Clearly, there are a multitude of other legitimate reasons that could support a decision to reject the plaintiff. A "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978). *McDonnell Douglas* merely prevents the defendant from taking advantage of the difficulties a plaintiff would face in proving discrimination by "stonewalling" and leaving the plaintiff to his proof. When the plaintiff establishes that he was not rejected for the two most common legitimate reasons, he effectively "smokes out" the defendant, who must then come forward and articulate or state what his legitimate reasons were. At that point, the plaintiff can direct his attack at disproving those purported reasons by showing them to be pretextual. *McDonnell Douglas* does nothing more than require the defendant to state a legitimate reason -- it remains the plaintiff's burden to prove discrimination by showing that the reason articulated was not the true reason for the decision. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Kirby v. Colony Furniture Company, Inc.*, 613 F.2d 696 (8th Cir. 1980); *Ambush v. Montgomery County Government*, ____ F.2d ____ ; 22 FEP 1101; 23 EPD, Para. 30,901 (4th Cir. 1980).

Assuming, arguendo, that Burdine established a prima facie case, TDCA articulated several legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz. TDCA, thereby, rebutted Burdine's prima facie case while she offered no

evidence that the reasons articulated by TDCA were pretextual.

TDCA articulated the following reasons for terminating Burdine while retaining and promoting Walz. Fuller testified that in her coordinating and supervisory role, Burdine was at least partially responsible for serious problems in the PSC program pointed out by DOL, including (1) lack of documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; and (5) unqualified enrollees being allowed into programs. Fuller also testified that Burdine was partially responsible for some dissension within the PSC program.

Burdine was unable to rebut Fuller's testimony that she bore partial responsibility for problems in the PSC program pointed out by DOL and for dissension in the program. There was no contention by Burdine that Walz was not qualified for the Project Coordinator position. There was no evidence that Walz was involved in the dissension within the PSC program or that he was in any way responsible for the problems with the program pointed out by DOL. In short, TDCA articulated several legitimate, nondiscriminatory reasons for its decision, and Burdine was unable to prove the reasons articulated were pretextual. Burdine did not satisfy her burden of proof.

II.

Even if Burdine's prima facie case had not been rebutted by TDCA, the District Court still could have concluded that Burdine failed to satisfy her burden of proving discrimination. A "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). A prima facie case permits an inference of discrimination -- it does not compel it. It is comparable to the inference that arises from a finding of res ipsa

loquitur. See e.g. *Kelly v. American Airlines, Inc.*, 508 F.2d 1379 (5th Cir. 1975).

The existence or non-existence of discrimination for Title VII purposes, particularly in a disparate treatment case, is predominately a question of fact and should be reviewed under a clearly erroneous standard as provided by Rule 52(a), Federal Rules of Civil Procedure. *Sweeney v. Board of Trustees*, 604 F.2d 106 (1st Cir. 1979) *cert. denied*, ____ U.S. ____, 100 S.Ct. 733 (1980). Such a determination is made by the trial judge based upon:

> "reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole." *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975) citing *Aeronca Manufacturing Co. v. NLRB*, 385 F.2d 724, 728 (9th Cir. 1967).

After weighing the evidence and assessing the reliability of the witnesses the District Court concluded that TDCA's decision to terminate Burdine while retaining and promoting Walz was not based either in whole or in part on consideration of sex. This finding of fact was not clearly erroneous and should have been affirmed by the Court of Appeals.

There was substantial evidence in the record to support the District Court's conclusion, in particular the testimony of Fuller that he considered Burdine to be partially responsible for the failures in the PSC program pointed out by DOL and also for some dissension within the program. Since there was substantial evidence to support the District Court's conclusion, it was not clearly erroneous.

Two Circuit courts of appeals have concluded that a finding on discrimination may be reversed, although

not clearly erroneous. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975), *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 443 U.S. 919 (1977). However persuasive the reasoning of those cases may be in disparate impact cases, it is inapplicable to a disparate treatment case. Finding the motivation for a particular personnel decision is the classic type of factual determination that district courts make on a daily basis. *See*, e.g. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Such a determination is not comparable to a finding of infringement of a patent or a finding that a gain should be treated as capital or ordinary for income tax purposes. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). It should only be reversed if found to be clearly erroneous.

CONCLUSION

For the reasons stated herein, TDCA respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit, holding that TDCA discriminated against Burdine on the basis of her sex when it terminated her while retaining and promoting Walz, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Brief of the Petitioner has been served upon the attorney for Respondent by placing same in the United States Mail, certified, return receipt requested, addressed to Mr. Hubert L. Gill, P.O. Box 777, Austin, Texas 78767, on this the _____ day of July, 1980.

LONNY F. ZWIENER

Supreme Court, U. S.
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No. 79-1764

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner
v.
JOYCE ANN BURDINE,
Respondent

On Writ of Certiorari To the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Defendant in a Title VII case, in articulating a legitimate, nondiscriminatory reason for an employment decision, must prove the reason by legally sufficient evidence or whether it must merely state a legitimate reason for its decision, even though such reason is fictitious and unsupported by the evidence.

2. Whether Respondent Burdine proved her charge of sex descrimination regarding the male, Walz, by a preponderance of the evidence regardless of of any error the Court of Appeals may have committed.

3. Whether the Court of Appeals may make an independent review of a finding of nondiscrimination by the trial Court or whether it must follow the clearly erroneous standard.

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No. 79-1764

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner

v.

JOYCE ANN BURDINE,
Respondent

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's rendition of the facts but would add and clarify as follows:

Respondent had several years of experience in manpower programs while Walz had very little previous experience. (Pl. Ex. XIV; Tr. p. 28)

Respondent was not given a promotion or increase in pay from the period between November 1972 and April 1973 although she was given additional responsibilities and duties. However, Malone was given an increase in pay for "increased responsibilities and work load." (Pl. Ex. XII).

Respondent clearly expressed her desire, both orally and in writing, to remain in the program after the reorganization. (Pl. Ex. II i,k,s; Tr. Pp 11-13).

The Department of Labor made no requirements as to who the new personnel in the program should be. (Pl. Ex. IIt; Tr. P. 94).

Respondent was never interviewed for the Project Director position, or for any other position to be created after the reorganization. (Tr. Pp. 105,109).

Although the agency director, Fuller, testified that he believed that Respondent was responsible for inadequacies in the program and dissension among staff members, absolutely no evidence was introduced to support this assertion. In fact, as the Court of Appeals noted, Burdine v. Texas Department of Community Affairs, 608 F.2d 563, 568, Ft.10 (5th Cir. 1979)., the problems with the PSC staff predated Respondent's assumption of the Project Director's duties. At least one of the two persons terminated along with Burdine had caused the former Project Director, Nealy, considerable difficulties and Nealy expressed this concern in a memorandum to Fuller. Burdine later encountered the same problems with this employee and detailed them in a memo to Malone (Pl. Ex. XVI and IIf).

SUMMARY OF ARGUMENT

1. TDCA did not articulate legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz.

2. Even if TDCA articulated legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz, Burdine successfully rebutted such reasons, proved them to be pretextual and prevailed by a preponderance of the evidence.

3. The Court of Appeals is not bound by the clearly erroneous test of Rule, 52(a), F.R.C.P., and may make an independent review of the record to determine if discrimination occurred; however, the findings of the District Court were clearly erroneous.

ARGUMENT

I.

The trial court made no express finding as to whether a prima facie case of discrimination was established using the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, the Court of Appeals found that a prima facie case was proven and TDCA has not challenged this finding. TDCA agrees that, under the McDonnell Douglas test, once a prima facie case is established, the burden then shifts to the employer to "articulate a legitimate, nondiscriminatory reason" for its conduct. However, TDCA takes issue with the Court of Appeals concerning amount of proof necessary by the employer in articulating this legitimate, nondiscriminatory reason. The Fifth Circuit has clearly held prior to the instant case that the employer must prove a legitimate, nondiscriminatory reason by a preponderance of the evidence, and that "articulate" means to prove by legally sufficient evidence. Turner v. Texas Instruments, 555 F.2d 1251, 1255 (5th Cir. 1977). If

the employee meets this burden, the burden then shifts back to the Plaintiff to show that such reason(s) was merely pretextual. TDCA asserts that this standard as set forth here and in Turner is in conflict with this Court's rulings in Furnco Construction Company v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). TDCA contends that it is only necessary for the employer to state a legitimate, nondiscriminatory reason for its conduct, regardless of whether there is any evidence to support it.

Here, the Court of Appeals spoke directly to this alleged conflict and rejected it. The Court of Appeals stated that Sweeney merely held that an employer is not required to prove the absence of a discriminatory motive; however, this does not mean that no evidence other than the bald assertion of a reason by the employer is sufficient to rebut the prima facie case. The Court of Appeals stated in Turner that:

> "To rule otherwise would unduly limit a Plaintiff's opportunity to respond to an employer's articulation of reasons. If an employer need only articulate - not prove - a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions ... and the Plaintiff would find himself attempting to prove that a reason without factual foundation - presumed true - was a pretext for discrimination... We would not act consistently with our national policy in favor of eliminating racial discrimination in employment if we did not allow the Plaintiff to challenge the factual validity of an employer's reasons offered to rebut a Plaintiff's prima facie case." Id at 1255-56.

This standard set forth by the Fifth Circuit has since been followed by the D.C. Circuit in Williams v. Bell, 587 F.2d 1240, 1246 (D.C. Cir. 1978), by the Tenth Circuit in Higgins v. Gates Rubber Company, 578 F.2d 281, 284 (10th Cir. 1978), and again by the Fifth Circuit in Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025,

1030 (5th Cir. 1980). Burdine respectfully submits that the cases cited by TDCA and in the employer's amicus curiae brief are not, as the briefs allege, supportive of TDCA's contentions. In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), decided after Sweeney, the Court followed Sweeney, but stated that the employer's defense

> "must be sufficient, on its face, to 'rebut' or 'dispel' the inference of discrimination that arises from proof of the prima facie case ... A passing reference by just one of many witnesses to some deficiency in the plaintiff's job rating, for example, would be insufficient. Nor would it be good enough to offer vague, general averments of good faith -a plaintiff cannot be expected to disprove a defendant's reasons unless they have been articulated with some specificity."

This Court's holdings in Furnco and Sweeney make the same distinction as did the Court of Appeals between "articulating (or proving) some legitimate, nondiscriminatory reason" for the conduct of the employer and in proving absence of a discriminatory motive. In Furnco, Supra, S.Ct. R. at 2950, this Court stated that "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." In Sweeney, the Court of Appeals stated that "in requiring the Defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." On review, this Court made the distinction, as did the Court of Appeals here, between articulating some legitimate, nondiscriminatory reason and proving absence of discriminatory motive. As the Court of Appeals held here, this distinction is not relevant in this case since the employer was not required to prove absence of discriminatory motive but merely to articulate a legitimate, nondiscriminatory reason for its conduct by legally sufficient proof. Obviously, to a large extent,

when the employer articulates or proves a legitimate, nondiscriminatory reason for its conduct it is also eliminating discriminatory motive or intent unless the Plaintiff is able to submit other credible evidence rebutting this presumption. However. the real question here is not whether the employer must prove absence of discriminatory motive but what quality of evidence is required to be presented.

In applying the standard here, the Court of Appeals found that regarding the transfer of the male, Watts, the employer had articulated a legitimate, nondiscriminatory reason in that Watts was shown to have been better qualified for the job than Burdine and that Burdine had failed to show that this reason was pretextual. However, regarding the retention of Walz and termination of Burdine, the Court held that the employer had simply made bald assertions that were unsupported by evidence and contrary to the other evidence to the effect that he considered the male qualified and that he followed the recommendations of others. No comparative factual data of qualifications and performance were introduced and no objective criteria for the jobs were stated. In fact, the other evidence clearly rebutted the employer's testimony. Concerning the "troublemaker" label, as the Court of Appeals stated, no evidence was ever introduced to support this charge and, in fact, the problems in the agency of a recalcitrant staff predated Respondent's job, as evidenced by a memo from her former supervisor. (Burdine, supra at 568, Ft. 10; Pl. Ex. XVI).

Therefore, proof of nonreliance on a discriminatory motive was not required in this case. The Petitioner was never able to articulate a legitimate, nondiscriminatory reason for its termination of Burdine and retention of Walz. The mere assertions that Burdine was a troublemaker and that she was responsible for deficiencies in the PSC program, even if proven to be true, which they were not, were not legitimate, nondiscriminatory reasons since no comparative data of male employees were

introduced by testimony or otherwise. Assuming arguendo that Burdine was a troublemaker and partially responsible for deficiencies in the PSC program, these reasons alone could not be considered nondiscriminatory unless the employer also showed, by testimony or otherwise, that the male, Walz, was not a troublemaker or was not partially responsible for the program deficiencies. No such showing was made in this regard. Further, the assertion by TDCA that to require the employer to prove reliance on a legitimate, nondiscriminatory reason is the same as requiring proof of absence of a discriminatory motive is simply incorrect. For example, reliance on a legitimate, nondiscriminatory reason, such as comparative qualifications or treatment, might be shown by the employer. The burden would then shift to the Plaintiff to show that this reason was merely a pretext and that another illegitimate reason was the basis for the employer's conduct. Thus, the burden would be on the Plaintiff, as it should be, to prove discrimination by a preponderance of the evidence. The employer's proof of reliance on qualifications would be, in effect, an affirmative defense that would have to be rebutted by the Plaintiff. The employer would not be required to prove absence of a disciminatory motive. Here, the Court of Appeals merely held that the employer had not articulated a legitimate, nondiscriminatory reason for its actions. To hold otherwise, as the Court of Appeals noted in Turner, would place the Plaintiff in the strange position of having to prove that legitimate but fictitious reasons unsupported by the evidence were not the real reasons for the employer's conduct. Respondent respectfully submits that such a requirement is not contemplated by Title VII or this Court.

II.

Assuming arguendo that the Court of Appeals committed error in this case in apportioning and quantifying the burden of proof, its decision should nonetheless be affirmed because Burdine successfully

rebutted any stated legitimate, nondiscriminatory reasons for the employer's conduct, proved them to be pretextual and established her claims by a preponderance of the evidence. TDCA in its brief states that the legitimate nondiscriminatory reasons for the employer's actions were: (1) lack of documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; (5) unqualified enrollees being allowed into programs, and (6) that Burdine was partially responsible for some dissension in the program. These allegations deserve comment.

The first five allegations against Burdine were testified about by E. B. Fuller, Executive Director of TDCA. Fuller is the person responsible for terminating Burdine and promoting the male, Walz. Actually these charges were derived by Fuller from a letter written to him by Charles E. Johnson, Contracting Officer of the United States Department of Labor (Pl. Ex. II)[1]. A reading of this letter shows that Burdine was in fact a member of the review team that discovered these and other deficiencies. Further, the impact of the letter is that, if any particular person could be blamed for the problems, it was Fuller himself and not Burdine. The required changes to the program included the hiring of a Project Director with complete authority to administer the program (emphasis added), appointment of a competent and qualified fiscal officer, a complete reorganization of the PSC staff and fiscal control under the direction of a Project Director. Other changes were required. Some of these suggested changes had already been urged by Burdine herself. (Pl. Ex. IIf).

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[1] All Exhibits were introduced into evidence pursuant to the Pre-Trial Order.

Concerning the allegations of dissension, again, Fuller could only make vague allegations of this nature. As the evidence shows and as the Court of Appeals found, any friction in the division predated Burdine's assumption of increased duties and had been outlined much earlier to Fuller by the former Project Director (Pl. Ex. XVI) and, later, by Burdine to her supervisor, Malone (Pl. Ex. IIf). Burdine, supra at 568. It is obvious, as the Court of Appeals found, Fuller himself deserved much of the blame for any friction in the division and he was simply attempting to make Burdine share this blame. No other evidence of any kind was introduced by TDCA to substantiate Fuller's allegations and Fuller was unable to state how Burdine was at fault. (Tr. Pp. 96-101).

The bald assertions made by the employer here do not approach the standard of evidence produced by the employer in Sweeney. The employer in Sweeney showed that another female took Sweeney's desired slot and that her unfavorable recommendation came from another woman. Sweeney, supra at 172. Further, the employer showed that there were also highly qualified males who had remained in the lower ranks of employment longer than Sweeney, that there were other males who were also not promoted on their first attempts and that other males also encountered difficulties in reaching the level of professor. Sweeney, supra at 178-179. Thus, comparative data of the sort lacking in this case, and required by the Court of Appeals, was present in Sweeney.

Other evidence in the record relied on by the Court of Appeals further enforces Burdine's contentions. The male Walz had been supervised and trained by Burdine (Pl. Ex. II b,e, Tr. Pp. 7, 9, 28). Walz had less experience in the manpower area and less seniority in the agency. (Pl. Ex. XIV; D. Ex. I). Burdine's qualifications were attested to by three other persons, including the former male Project Director (Tr. Pp. 57-61, 52-55, 62-66). And, although Fuller decried seniority and experience as a factor in retaining Walz and firing Burdine (Tr. P. 107), he relied on

these same factors in the transfer from another division of a new male Project Director (Tr. P. 108). Further, as noted by the Court of Appeals, there was no reliance on objective job criteria or comparison of qualifications in the job selection process. Burdine, supra at 568. Also see Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

Thus, the actual effect of the ruling of the Court of Appeals is that the employer's unsupported allegations were simply not credible evidence worthy of belief in light of the total evidence produced at the trial. Respondent submits that, in this case, whether the employer was required by the Court of Appeals to justify its employment decision by a preponderance of the evidence rather than by a lesser standard of proof is unimportant since Burdine prevailed on the whole by a preponderance of the evidence. The effect of its judgment was that, as in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), but for her sex, female, Burdine would have been retained rather than terminated.

Thus, Respondent Burdine submits that the evidence clearly establishes her right to recover on the question of her termination and the promotion of Walz regardless of any error that may have been committed by the Court of Appeals. Burdine respectfully submits that she is entitled to recover on the merits of the case, regardless of the standard of proof used, that this Honorable Court should affirm the judgment of the Court of Appeals.

III.

TDCA asserts that the Court of Appeals erred in making an independent review of the record to determine if discrimination had occurred rather than applying the clearly erroneous standard. The Fifth Circuit followed the rule first set down by it in Causey v. Ford Motor Company, 516 F.2d 416 (5th Cir. 1975) and later followed in East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1977). In Causey, the Court discussed the distinction between

application of the clearly erroneous test of Rule 52(a), Federal Rules of Civil Procedure, to findings of subsidary facts and to findings of ultimate facts. The Court held that the finding of a subsidiary fact is the determination of an evidentiary or primary fact while the finding of an ultimate fact "may involve the very basis in which judgment of fallible evidence is to be made." Causey at 420 citing Baumgartner v. United States, 1944, 322 U.S. 665,671, 64 S. Ct. 1240, 1244, 8 L. Ed. 1525, 1529. Among examples, the Court stated, are findings such as patent infringements and capital gains for tax purposes. The Court then held that, although discrimination vel non is essentially a question of fact, it is at the same time the ultimate issue for resolution of the case as proscribed by 42 U.S.C.A. Sec. 2000 e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact and may be determined by an independent review of the record free and clear of the clearly erroneous standard. The Seventh Circuit also adopted this standard in Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), cert. denied, 443 U.S. 919 (1977).

In East, supra, the Court determined that the lower Court had not made a determination according to the McDonnell Douglas standard and that, pursuant to Causey, an independent review of the record was necessary. The same situation is applicable in the instant case and the Court of Appeals proceeded, as in Causey and East, to make an independent review of the record.

Although TDCA acknowledged the efficacy of Causey and East, it argues that this reasoning should not apply here since the instant case is one involving disparate treatment rather than disparate impact. Respondent submits that this distinction does not exist but that, even if it did, it is a distinction lacking materiality. Both Causey and East involved questions of disparate treatment and disparate impact. Ms. Causey's allegations included failure to hire her prior to hiring of males and failing to re-hire her prior to re-hiring of males. Ms. East also complained of failure to hire because of disparate

treatment with males. Necessary comparisons were made in both cases with the treatment afforded certain male employees. Therefore, it is clear that TDCA's distinction is not valid and that the Court of Appeals adopted the proper standard of review. Further whether discrimination may be alleged on the basis of disparate impact or disparate treatment, it is in both cases a question of ultimate fact.

TDCA urges the adoption of the clearly erroneous standard as applied by the First Circuit in Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979) cert. denied __ U.S. __, 100 S. Ct. 733 (1980). There, the Court rejected the Causey standard. Ironically, it was the employer in Sweeney that was urging adoption of the Causey mode of review. However, even in Sweeney, supra at 109, Ft. 2, the Court stated that the clearly erroneous standard does not shield findings that are unsupported or arbitrary.

Burdine submits that the Fifth and Seventh Circuit standards clearly apply in this case and that there is no compelling reason to disturb those standards. This standard has evident value in cases such as the instant case where the Trial Court failed to adopt the proper McDonnell Douglas standard. If the Court of Appeals were unable to make an independent review of the facts it would be necessary in every such case to remand for new findings, thus contributing to the already overburdened trial dockets. Use of the Causey standard, eliminates such problems.

Finally, Respondent argues that, as set forth in part II, above, the findings of the Trial Court were properly reversed by the Court of Appeals even under the application of the clearly erroneous standard of Rule 52(a).

CONCLUSION

For the reasons stated herein, Respondent Burdine respectfully prays that the judgment of the United States

Court of Appeals for the Fifth Circuit holding that TDCA discriminated against her because of her sex when it terminated her while retaining and promoting Walz, be affirmed.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, HUBERT L. GILL, Attorney for Respondent, do hereby certify that three true and correct copies of the foregoing Brief for Respondent have been served upon the Attorney for Petitioner by placing same in the United States mail, certified, return receipt requested, addressed to Lonny F. Zwiener, Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 21st day of October, 1980.

Hubert Gill
HUBERT L. GILL

Supreme Court, U. S.
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No. 79-1764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner,

v.

JOYCE ANN BURDINE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1764

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner,

v.

JOYCE ANN BURDINE,
Respondent.

**On Writ of Certiorari To The
United States Court of Appeals
For The Fifth Circuit**

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of all parties respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the court below erred in holding that in an individual disparate treatment case, once a plaintiff has established a prima facie case of discrimination, the burden which shifts to the employer is to prove affirmatively, by a preponderance of the evidence, that the employment decision was for a legitimate, nondiscriminatory reason and that persons retained or promoted were better qualified than the plaintiff.[2]

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[2] Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in this Court in *Intl. Bro. of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395 (1977); *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978); and *County of Los Angeles* v. *Davis*, 99 Sup. Ct. 1379 (1979).

STATEMENT OF THE CASE

Ms. Burdine worked in a program that was completely funded by the U.S. Department of Labor (DOL). Dissatisfied with the Texas Department of Community Affairs' (TDCA) administration of the project, DOL conditioned future funding upon implementation of certain organizational changes, including appointment of a project director and correction of other specified problems, such as overstaffing and lack of communication among the program staff. Subsequently, Burdine applied for the project director position, but a more qualified candidate was selected. Thereafter, as found by the district court, Burdine was terminated in a reduction-in-force in part because of her inability to work well with other employees. As a result of these personnel actions, she filed a sex discrimination charge against TDCA.

The district court denied the relief sought by Burdine, because it found in effect that TDCA had articulated legitimate, nondiscriminatory reasons for its employment decisions. On appeal, the Fifth Circuit affirmed the lower court's determination regarding the promotion discrimination charge but overturned its ruling concerning the discharge. Finding that, with respect to both charges, the plaintiff had established a prima facie case of discrimination, the court of appeals shifted to the employer a burden of proof beyond that required by the district court. Specifically, the Fifth Circuit required TDCA (1) to prove legitimate, nondiscriminatory reasons by a preponderance of the evidence and (2) to prove that the persons promoted or retained were better qualified than was the plaintiff. In stating that this burden of persuasion is not inconsistent with *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978) (per curiam), the court below erroneously distinguished its burden of proof requirement from that in *Sweeney*. (Pet. App. A-11).

SUMMARY OF ARGUMENT

The burden of proof which the Fifth Circuit imposes on defendants in Title VII suits involving allegations of disparate treatment is not in conformance with this Court's decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1977); and *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), that the burden which shifts to the defendant is merely to articulate legitimate, nondiscriminatory reasons for the employment decision and not to prove nondiscriminatory reasons by a preponderance of the evidence. When an employer simply explains its action, it has met its burden of production. *Sweeney*, 439 U.S. at 26 n.2. Except for the Fifth Circuit, all courts of appeals properly apply the *McDonnell Douglas* analysis and leave the burden of persuasion at all times with the plaintiff. The second part of the burden of proof imposed on the employer by the court below—*i.e.*, to prove that the persons promoted or retained were better qualified—also exceeds and conflicts with the proof requirements of *McDonnell Douglas* and inappropriately applies principles of disparate impact proof in a disparate treatment case.

ARGUMENT

THE BURDEN OF PROOF WHICH THE COURT BELOW REQUIRED THE DEFENDANT TO MEET IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND INAPPROPRIATELY PLACES A BURDEN OF PERSUASION ON EMPLOYERS IN CASES INVOLVING INDIVIDUAL ALLEGATIONS OF INTENTIONAL DISCRIMINATION

1. After a Prima Facie Case of Discrimination Has Been Established in a Disparate Treatment Case, The Burden of Proof Which Shifts to The Employer is to State a Valid Reason For The Employment Decision

Beginning with *McDonnell Douglas* and continuing through *Sweeney*, this Court has consistently and without equivocation instructed that, in individual disparate treatment cases under Title VII, the burden that shifts to the employer, after the complainant has made a prima facie showing of discrimination,[3] is only the burden of

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[3] For an individual plaintiff to establish a prima facie case of discrimination under a disparate treatment theory, the Court held in *McDonnell Douglas* that a plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802 (footnote omitted).

These elements of proof may be applied to allegations of sex discrimination involving promotions and discharges, as here.

Once a plaintiff has proven these elements, "[t]he burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason [for the employment decision]. . . . [T]his suffices to discharge the petitioner's burden of proof

"articulat[ing] some legitimate, nondiscriminatory reason" for the employment decision. *McDonnell Douglas*, 411 U.S. at 802; *Furnco*, 438 U.S. at 577; and *Sweeney*, 439 U.S. at 25. Although in *Furnco*, 438 U.S. at 576-577, the words "proving" and "articulating" (legitimate, nondiscriminatory reasons) were used interchangeably in describing the defendant's burden, this Court clarified in *Sweeney* that "under *Furnco and McDonnell Douglas* the employer's burden is satisfied if he simply '*explains* what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons'." 439 U.S. at 25 (emphasis added).[4] Moreover, Justice Stevens' dissent in *Sweeney* further clarifies the limited burden of production resting upon the defendant in a disparate treatment case:

> In litigation the only way a defendant can "articulate" the reason for his action is by adducing evidence that *explains* what he has done; when an executive takes the witness stand to "articulate" his reason, the litigant for whom he speaks is thereby proving those reasons. *Id.* at 28-29 (emphasis added).
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> [I]t is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer; the burden of persuasion . . . remains with the plaintiff. *Id.* at 29.

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at this stage and to meet respondent's prima facie case of discrimination." *Id.* at 802-803. The plaintiff, however, must then "be afforded a fair opportunity to show that the petitioner's *stated reason* . . . was in fact a pretext . . . [or] a coverup for a . . . discriminatory decision." *Id.* at 804-805 (emphasis added).

[4] In doing so, the Court explicitly rejected the First Circuit's formulation that the defendant "prove absence of discriminatory motive," finding it to be a substantially heavier burden then merely articulating some legitimate, nondiscriminatory reason. 439 U.S. at 24-25.

It is now clear, therefore, in all circuit courts except the Fifth Circuit, that *McDonnell Douglas* leaves the burden of persuasion at all times with the plaintiff in Title VII suits involving individual allegations of intentional discrimination.[5] Consequently, the employer's burden to "articulate" a legitimate, nondiscriminatory reason does not require, as under the Fifth Circuit's formulation, that it prove those reasons by a preponderance of the evidence or in effect persuade the trier of fact that it acted for legitimate rather than discriminatory reasons. Instead, it is a burden of production, that is, to state a valid reason, after which the complainant under *Mc-*

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[5] Except for the Fifth Circuit, all other circuit courts limit the defendant's burden of production to articulating or stating legitimate, nondiscriminatory reasons. *See, e.g., Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1980), *cert. denied*, 48 U.S.L.W. 3465 (U.S. 1980); *Lieberman* v. *Gant*, 23 FEP Cases 505 (2d Cir. 1980); *Kunda* v. *Muhlenberg College*, 22 FEP Cases 62 (3d Cir. 1980); *Ambush* v. *Montgomery City Government*, 22 FEP Cases 1101 (4th Cir. 1980); *Abrams* v. *Johnson*, 534 F.2d 1226 (6th Cir. 1976); *Holder* v. *Old Ben Coal Co.*, 21 FEP Cases 1463 (7th Cir. 1980); *Kirby* v. *Colony Furniture Co., Inc.*, 613 F.2d 696 (8th Cir. 1980); *Miller* v. *Williams*, 20 FEP Cases 809 (9th Cir. 1979); *Hernandez* v. *Alexander*, 607 F.2d 920 (10th Cir. 1979); and *Chalk* v. *Secretary of Labor*, 565 F.2d 764 (D.C. Cir. 1977). Relying on this Court's holdings, the Second Circuit in *Lieberman* explicitly rejected the burden of proof standard required by the Court below.

At least two Fifth Circuit decisions appear to be in conformance with the *McDonnell Douglas-Sweeney* line of cases, although neither relied on *Sweeney* as authority. *See Blum* v. *Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (panel decision) (per curiam); and *Jepsen* v. *Florida Bd. of Regents*, 21 FEP Cases 1700 (5th Cir. 1980). More recently, however, in *Jeffries* v. *Harris County Community Action Assn*, No. 77-1848 (5th Cir. April 21, 1980), the Fifth Circuit required the defendant to meet the same erroneous burden of proof as in the instant matter.

Donnell Douglas has an opportunity to show that the stated reason was in fact pretextual or a coverup for a discriminatory decision. 411 U.S. at 804-805.

That the employer merely has a burden of production logically follows the burden of proof scheme of *McDonnell Douglas* because, if the employer were to prove by a preponderance of the evidence his reasons—or in effect that his reasons were not a pretext—there would be no justification for the third stage of the *McDonnell Douglas* analysis, which allows the complainant to show that the reason was a pretext. *Sweeney*, 439 U.S. at 24 n.1. To say that the defendant must prove that its action was based on a legitimate reason, and then that the plaintiff has an opportunity to prove that it was not, is contradictory and not in conformance with the principles of *McDonnell Douglas*. *Loeb* v. *Textron*, 600 F.2d 1003, 1012 (1st Cir. 1980).

The Fifth Circuit's heavier burden of proof requiring the defendant "to prove legitimate, nondiscriminatory reasons for his actions by a preponderance of the evidence" was established in *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977), on which the court below relied. The *Turner* court established its erroneous proof standard on the faulty proposition that:

> If an employer need only *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions. The employer would have met his burden under *McDonnell Douglas*, and the plaintiff would find himself attempting to prove that a reason without factual foundation—presumed true—was a pretext for discrimination. *Id.* at 1255.

This reasoning cannot be reconciled with the proof requirements of *McDonnell Douglas*. If the employer's rea-

sons are fictitious and if the plaintiff demonstrates that they are, these reasons would not be legitimate or valid and would constitute, accordingly, a pretext or coverup for discrimination. *See McDonnell Douglas*, 411 at 804-805. *See also, e.g., Loeb*, 600 F.2d at 1012 n.6. ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if it indeed is one"); *Sabol* v. *Snyder*, 524 F.8d 1009, 1111 (10th Cir. 1974) (Employer's reason that the other applicant was better qualified was shown to be a pretext); and *Gates* v. *Georgia Pacific*, 492 F.2d 292, 296 (9th Cir. 1974) (Employer's promotion from within policy was not a *valid* reason because the company also advertised for the position in the newspapers). The proper application of *McDonnell Douglas*, therefore, adequately addresses the concerns of the *Turner* court, and in any event, as shown above, the Fifth Circuit's approach would make entirely superfluous the third step of the *McDonnell Douglas* analysis. See p. 8, *supra*.

2. The Fifth Circuit's Burden of Proof Requiring Employers to Show That The Person Promoted or Retained Was Better Qualified is Inconsistent With *McDonnell Douglas* And is Premised on Principles of Proof in Disparate Impact Rather Than Disparate Treatment Cases

Similarly, there is no proper foundation for the second requirement in the Fifth Circuit's burden of proof; *i.e.*, that the employer prove that the person promoted or retained was better qualified than the complainant. The fact that the person promoted or retained may be better qualified than the plaintiff is but one of many possible legitimate, nondiscriminatory reasons for employment decisions.

Significantly, the Court in *McDonnell Douglas* placed no restrictions or limit on the types of reasons which

appropriately may be legitimate and nondiscriminatory [6] and certainly did not mandate that the employer proffer evidence concerning the relative qualifications of candidates. Indeed, the facts of that case did not lend themselves to a comparison of qualifications which the Fifth Circuit mandates in this case. There, a black mechanic, who had been laid off in the course of a general reduction-in-force protested his discharge by participating in activity that blocked the entrance to his former employer's plant. Subsequently, McDonnell Douglas advertised for qualified mechanics, but rejected the plaintiff's application because of his participation in unlawful conduct. Although there was no comparison of qualifications, this Court found that the defendant's subjective reasons were "suffic[ient] to discharge petitioner's burden of proof . . . and to meet respondent's prima facie case of discrimination." 411 U.S. at 803. Of course, in appropriate circumstances the fact that one candidate is better qualified than another may be the employer's reason for the personnel decision, but as shown above, an employer need not prove this by a preponderance of the evidence. The burden of persuasion remains with the plaintiff and the validity of such a reason can be shown to be a pretext at the third stage of the *McDonnell Douglas* analysis.

In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), relied on by the court below, the Fifth Circuit established the comparative evidence standard relative to qualifications which is at issue here. The underpinnings for its view that "comparative evidence lies at the heart of a prima facie case of discrimination" draws its support, however, from principles of proof involved in a disparate

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[6] In this regard, the Court stated: "We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire." 411 U.S. at 802-803. Nothing in *Furnco* or *Sweeney*, moreover, alters this view of the Court.

impact theory of discrimination, not disparate treatment.[7] *Id.* at 339. Because there are fundamental differences between the two theories of discrimination, principles of proof involved in individual disparate impact cases are not applicable or transferable to individual disparate treatment cases. *Cf. Furnco*, 438 U.S. at 583 (Marshall, J., concurring and dissenting) ("[O]ur cases establish a different way of proving [disparate impact]").

In a disparate impact case, the plaintiff alleges that employment practices that are neutral on their face and in their intent, discriminate in effect against a protected group. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); and *Intl. Bro. of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15. Although "[p]roof of discriminatory motive is critical" in a disparate treatment case, such "[p]roof of discriminatory motive . . . is not required under a disparate impact theory." *Teamsters*, 431 U.S. at 335-336 n.15. *See also, Furnco*, 438 U.S.

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[7] The Fifth Circuit in *Romine* stated:

> This need for comparative evidence is vital in this field of law. It is exemplified in the cases in which "objective criteria", such as performance tests and educational attainment, have been used to make employment decisions. In many of these cases the trial judge must decide whether a performance test sufficiently measures the skills necessary for the job. But in no case that we have found has the judge held that merely introducing the raw score of blacks and women on such a test constitutes a sufficient rebuttal to charges of discrimination. The employer must show that those whom he has hired or promoted have done better on the examination than those who were rejected or denied promotion. 518 F.2d at 339-340.

at 583 (Marshall, J., concurring and dissenting). Thus, in contrast to a disparate treatment theory of discrimination, an allegation of disparate impact by an individual focuses on the "*consequences* of employment practices, not simply motivation" which have affected the complainant as well as others. *Griggs*, 401 U.S. at 432 (emphasis in original). Consequently, once a plaintiff has established a prima facie case of disparate impact, comparative evidence of the qualifications or performance of those who have been selected or retained may be very relevant, because the burden which shifts to the employer is not to explain the reasons for nonselection as in a disparate treatment case, but rather to show that the selection procedure "bear[s] at demonstrable relationship to successful job performance." *Griggs*, 401 U.S. at 431. Comparative evidence of qualifications, however, is significantly less pertinent in individual disparate treatment cases, because an individual complainant is "seeking to prove one instance of discrimination. An employer's isolated decision to reject an applicant . . . does not show that the rejection was [discriminatorily] based." *Teamsters*, 431 U.S. at 358 n.44.

In sum, the defendant's burden of proof in cases involving individual allegations of intentional discrimination is qualitatively different than that in cases involving issues of disparate impact and, accordingly, does not necessitate in all circumstances comparative evidence of qualifications to rebut a prima facie case. More importantly, as *McDonnell Douglas* shows, the relative qualifications of candidates may not be the only legitimate, nondiscriminatory reason for not promoting or retaining an employee.

CONCLUSION

The burden of proof which the Fifth Circuit required the employer to meet is inconsistent with prior precedent of this Court and interferes with the practical scheme for proof established in *McDonnell Douglas* for addressing the critical issue of intentional discrimination. For the reasons given above, the Amicus Curiae urges the court to reverse the decision of the Court of Appeals for the Fifth Circuit below and sustain the district court's denial of the Respondent's claim.

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